2. Framework for Review: Historical and International Perspectives

Contents

Summary

2.1 The Terms of Reference ask the ALRC to examine the 'connection requirements, relating to the recognition and scope of native title'. In that context, this chapter outlines a framework for review of the relevant provisions of the *Native Title Act 1993* (Cth) ('*Native Title Act*').

2.2 This chapter first places native title law in Australia in an historical context by reference to the derivation of native title in common law jurisprudence. It canvasses the factors leading to the recognition of native title in *Mabo v Queensland [No 2]* ('*Mabo*

[No 2]').[1] The second section discusses the *Native Title Act* and the subsequent interpretation of s 223 of the Act.

2.3 The ALRC considers that the 'laws and customs' model for defining native title fulfils the important function of recognising native title, but it contributes to a complex legal test for connection in the *Native Title Act* that calls for considered reform. Statutory construction of s 223 of the *Native Title Act* has expanded the requirements for proof of native title.[2]

2.4 The ALRC's recommendations retain the framework of native title derived from *Mabo [No 2]* but address entrenched difficulties in the proof of native title. The recommendations are directed to a specific range of connection requirements to better accord with the Preamble and guiding objectives of the *Native Title Act.*

2.5 The recommendations deal with a central problem that faces the native title claims system—how to allow for traditional laws and customs to evolve in response to circumstances brought about by European settlement, while ensuring that the pre-sovereign origins of laws and customs are retained. This problem is reflected in the dissenting judgment of Black CJ in the Full Federal Court in *Yorta Yorta*:

> native title will no longer exist once its foundation has disappeared by reason of the disappearance of any real acknowledgment of traditional law and real observance of traditional customs. Where such circumstances exist, the claimed rights and interests will no longer be possessed under what are truly 'traditional' laws acknowledged and customs observed.
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> It is wrong, however, to see 'traditional' as, of its nature, a concept concerned with what is dead, frozen or otherwise incapable of change.[3]

2.6 The ALRC acknowledges, however, that rigorous testing of connection requirements is important to secure transparency for governments and third parties, to ensure the integrity of the claims system and to facilitate identification of the appropriate members of a claim group.

Recognition as the foundation for native title

2.7 This chapter traces the development of legal principles which have shaped the 'connection requirements' for determining native title and outlines implications for the proof of native title. [4]

2.8 Recognition of native title holds great significance for Aboriginal peoples and Torres Strait Islanders, as reflected in the Preamble and objects of the *Native Title Act*.

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1 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 58.
2 A more complete analysis is in Chs 4–7.
3 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR [34]–[35] (Black CJ).
4 Paul Burke notes that 'some of the problems underlying the specific questions of the inquiry stem back to fundamental choices in the judicial formulation of the legal doctrine of native title': P Burke, *Submission 33*.

2.9 The concept can be thought of as

> the metaphorical result of applying rules whereby rights and interests are defined at common law as having vested, at the time of annexation, in the members of an Aboriginal society by reason of its traditional laws and customs and the way in which they define its relationship to land and waters. It is not a 'mere' metaphor. Its choice reflects a desire to give effect legally to the human reality involved in the ordinary meaning of 'recognition'.[5]

2.10 Submissions to the Inquiry emphasised that *Mabo [No 2]* has been accepted as a principled platform for dealing with historical injustice drawing upon international law.[6] The 'recognition' model for proof of native title adopted from *Mabo [No 2]* however entails particular constraints.[7] Basically, these arise from two sources. First, inherent constraints arise from a recognition and continuity model that emphasises a traditional laws and customs framework for proving pre-existing native title rights and interests. These difficulties are increased as the system of recognition of rights and interests under the *Native Title Act* has been implemented many years after European settlement.

2.11 Secondly, and building on this model, is the construction of the definition of native title under the Act, in a manner which has added or amplified requirements such as 'traditional', 'continuity' and 'society' (see Chapters 4–7) and contributed to increasing specificity in the scope of the native title rights and interests that are recognised (Chapter 8). Under the ALRC's recommended reforms, the central function of recognition is retained to ensure that the basis of native title is maintained. Recognition may be thought of as lying

> at the heart of the common law of native title and the Act … It is embedded in a matrix of rules defining the circumstances in which recognition will be accorded to native title rights and interests and those in which it will be withheld or withdrawn. The idea of recognition operates in a realm of legal discourse. It may be seen as a kind of translation of aspects of an indigenous society's relationship to land and waters into a set of rights and interests which exist under non-indigenous laws.[8]

2.12 Recognition of native title also remains significant, as the common law 'will, by the ordinary processes of law and equity, give remedies in support of the relevant rights and interests to those who hold them'.[9] The *Native Title Act* is the mechanism for the recognition and protection of native title.[10]

Native title in its historical context

2.13 *Mabo [No 2]* and the introduction of the *Native Title Act* cannot be understood in isolation.[11] The decision was framed against British Imperial law, Australia's prior

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5 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [948].
6 V Marshall, *Submission 11*; Law Society of Western Australia, *Submission 9*; S Bielefeld, *Submission 6*.
7 Simon Young, *Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008) 234–247.
8 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [948].
9 *Commonwealth v Yarmirr* (2001) 208 CLR 1, [42].
10 *Native Title Act 1993* (Cth) s 11.
11 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

designation as a 'settled' colony, and the 200 years of European settlement. The decision occurred in the context of a reassessment of the position of Aboriginal and Torres Strait Islander peoples within Australian society, increased momentum towards recognition of indigenous rights in common law countries and developing human rights standards in international law.[12]

2.14 Over time in Australia, there has been significant change in attitudes towards the acknowledgement of the laws and customs of Aboriginal and Torres Strait Islander peoples.[13] In 1986, the ALRC Report on the *Recognition of Aboriginal Customary Laws* noted:

> Indeed, so far as the recognition of Aboriginal culture and traditions is concerned it is possible to discern something of a cyclical process, with periods of tolerance, 'protection' or even qualified approval interspersed with periods of rejection when attempts were made to eradicate traditional ways and to 'assimilate' Aborigines, in the sense of absorbing them and denying them any separate identity.[14]

2.15 The 1986 Report did not make recommendations for the recognition of Indigenous peoples' rights to land and waters. However, it was influential in terms of its reassessment of Aboriginal laws and customs.[15] The Report also noted:

> British settlers who came into contact with the Australian Aborigines came into contact with a people having their own well-developed structures, traditions and laws … In particular, it can be said that mechanisms for the maintenance of order and resolution of disputes, that is, a system of law, existed within Aboriginal groups.[16]

British Imperial law and the doctrine of continuity

2.16 The framework of native title law, based on 'recognition' and 'continuity' of laws and customs, has its origins in earlier legal rules about what occurred upon the acquisition of a colony. According to *Mabo [No 2]* the rights and interests that constitute native title have their origins in those rights and interests acknowledged under traditional laws and customs which pre-existed British sovereignty.[17] Native title, though recognised by the common law, is not an institution of the common law.[18]

2.17 The principle that pre-existing rights can be recognised under a new sovereign therefore pre-dates the decision in *Mabo [No 2]*. It was not uncommon in the British

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12 'Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports': Ibid 42 (Brennan J).

13 See generally Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) Ch 3.

14 Ibid [21].

15 Young, above n 7, 231.

16 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) 32.

17 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 53.

18 Ibid 59.

Empire for sovereignty to be acquired over territories with existing populations, laws and property rights. The rules for determining which rights would be recognised under the new sovereign were a matter for British Imperial law. In part, the rules depended on the distinction between settled and conquered (ceded) colonies. There are parallel concepts in international law.[19] The original common law rules did not consider the indigenous inhabitants of British possessions,[20] but were subsequently adapted to that purpose.

2.18 In colonies acquired by conquest or cession, local laws remained intact, unless found to be repugnant to the common law (*malum in se*).[21] At the time of the acquisition of New South Wales, the rule for conquered colonies was that local laws remained in place until abrogated or modified by prerogative.[22] A rider against repugnant laws remained.[23] The rules included the presumption that pre-existing property rights were to be respected by the conquering sovereign (doctrine of continuity).[24]

2.19 In a 'settled' or 'desert and uninhabited' colony, the laws of England, if not inconsistent with local circumstances, were imported on acquisition of sovereignty.[25] The doctrine of continuity was thought not to pertain to settled colonies: logically, if there were no local laws then there were no rights of property to respect. The distinction between settled and conquered colonies was of significance in *Milirrpum v Nabalco* ('*Milirrpum*')[26] and *Mabo [No 2]*.

2.20 While much modern discourse assumes that New South Wales was *terra nullius* and a settled colony, it is not clear to what extent the British Colonial Office averted specifically to the status of the colony,[27] or determined it was 'desert and uninhabited'.[28] The settled colony designation is traced to the 1880s Privy Council

19 For why common law rather than international law applied, see Ulla Secher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (Hart Publishing, 2014) 96. The concept of *terra nullius* referred to land that is uninhabited for legal purposes ie 'un-owned' in a legal sense. With respect to Australia, it is the common law rules which govern.

20 PG McHugh, 'The Common Law Status of Colonies and Aboriginal "Rights": How Lawyers and Historians Treat the Past' (1998) 61 *Saskatchewan Law Review* 393, 402.

21 The original rule distinguished Christian rulers, where the laws were to remain in force until altered by the British Crown, but in a country ruled by an 'infidel' all laws were abrogated immediately: *Calvin's Case ('the Post-Nati')* (1608) 7 Co Rep 1a, 17b [77 ER 377, 398].

22 *Campbell v Hall* (1774) 1 Cowp 208 [98 ER 1047].

23 Charles Clark, *A Summary of Colonial Laws* (1834); *Mostyn v Fabrigas* (1774) 1 Cowp. 161.

24 For discussion of the doctrine of continuity see Secher, above n 19, 98–100.

25 For more recent cases, see *Mabo v Queensland [No 2]* (1992) 175 CLR 1; *Ngati Apa v Attorney-General* [2003] 3 NZLR 643; *Paki v Attorney-General* [2014] NZSC 118.

26 *Milirrpum v Nabalco* (1971) 17 FLR 141.

27 Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia*, 1788–1836 (Harvard University Press, 2010).

28 The Colonial Office believed Aboriginal Australians were not numerous. Governor Phillip's instructions were to 'conciliate' with the natives, but otherwise made no provision for them. Ford, above n 27, ch 2.

case, *Cooper v Stuart*.[29] Earlier, in 1847, *Attorney-General v Brown* had held that upon settlement, title to the waste lands of the colony vested in the Crown.[30]

2.21 While early decisions did refer to the distinction between settled and conquered colonies, judges were aware that the distinction pertained to colonists, not to the indigenous inhabitants. Early colonial case law in Australia did not consider indigenous interests in land. Rather, the courts examined whether common law applied to Aboriginal peoples, specifically criminal law, although approaches varied.[31]

2.22 In 1836 in *R v Murrell*, Burton J held that

> although it be granted that the aboriginal natives of New Holland are entitled to be regarded by Civilized nations as a free and independent people, and are entitled to the possession of those rights which as such are valuable to them, yet the various tribes had not attained at the first settlement of the English people amongst them to such a position in point of numbers and civilization, and to such a form of Government and laws, as to be entitled to be recognized as so many sovereign states governed by laws of their own.[32]

2.23 In effect, Burton J applied principles similar to the 'enlarged theory of *terra nullius*', applied by Brennan J in *Mabo [No 2]*. Aboriginal people were understood factually to have been present at sovereignty in Australia, but their social systems and governance were not recognised by British law—it was, in this sense only, 'desert and uninhabited'. By the 1860s, it was increasingly accepted that Aborigines were to be treated as British subjects. Thereafter, only common law would apply to govern Indigenous peoples within Australia.

2.24 The ALRC's 1986 report *Recognition of Aboriginal Customary Laws* noted 'this [ie one unitary system of law], and other governmental policies applied since 1788 at the national, state and local levels, have had a drastic impact on Aboriginal customs and culture'.[33] The recognition of indigenous claims to land did not receive judicial consideration until 1971.

2.25 From this overview, it is apparent that the legal question of whether the pre-existing rights of Australia's Indigenous peoples 'continued', and could be recognised, was closely connected to the status of traditional laws and customs. In turn, this issue hinged on the designation of the colony. The focus on traditional laws and customs requiring recognition has continued in the connection requirements under the *Native Title Act*.[34]

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29 *Cooper v Stuart* (1889) 14 App Cas 286, 291. The Privy Council, in obiter, noted New South Wales was, as 'a tract of territory, practically unoccupied, without settled inhabitants or settled land, at the time when it was peacefully annexed to the British dominions'.

30 *Attorney-General v Brown* (1847) 1 Legge 312. For a discussion of the concept of 'waste lands', see *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 26–28 (Brennan J).

31 Bruce Kercher, 'R v Ballard, R v Murrell and R v Bonjon' (1998) 3 *Australian Indigenous Law Reporter* 410.

32 *R v Jack Congo Murrell* (1836) 1 Legge 72.

33 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [1].

34 See Ch 5.

The first land claim case: Milirrpum v Nabalco

2.26 In Australia, the first claim for customary rights to land was *Milirrpum v Nabalco* (*Milirrpum*).[35] The Yolngu people, in response to bauxite mining on their traditional lands, sought a declaration in the Supreme Court of the Northern Territory that they were entitled to the occupation and enjoyment of their land without interference.[36] Blackburn J held as a matter of fact, that the Yolngu had a

> subtle and elaborate system of social rules and customs which was 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 person whim or influence. If ever a system could be called 'a government of law, and not of men', it is that shown in the evidence before me.[37]

2.27 Blackburn J determined, however, that communal native title was not part of the common law of Australia, as the Court felt bound by *Cooper v Stuart*.[38]

2.28 Further, while finding that there was, as a matter of fact, a system of laws, the Court found the claimants had not shown, on the balance of probability, that their ancestors had the same links to land as the current holders.[39] Some commentators have pointed to a 'converging emphasis on laws and customs' in the pre-*Mabo* period.[40] In case law construing the *Native Title Act*, a similar factual inquiry is framed as to whether 'connection' is established, based on whether acknowledgement of traditional laws and customs has been substantially uninterrupted since pre-sovereignty.[41]

2.29 In *Milirrpum*, Blackburn J also found that 'there is so little resemblance between property, as our law … understands that term, and the claims of the plaintiffs for their clans, that I must hold that these claims are not in the nature of proprietary interests'.[42] The clan failed to show a significant economic relationship with the land.[43] A 'spiritual relationship' was 'well proved',[44] but this relationship was found to be more in the nature of an obligation than of 'ownership'.[45]

2.30 The legal character of native title rights and interests and the relationship between Aboriginal people and Torres Strait Islanders and their traditional lands and waters has continued to reverberate through native title case law. Questions of the

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35 *Milirrpum v Nabalco* (1971) 17 FLR 141.
36 See generally John Hookey, 'The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?' (1972) 5 *Federal Law Review* 85.
37 *Milirrpum v Nabalco* (1971) 17 FLR 141, 267.
38 Ibid 242.
39 *Milirrpum v Nabalco* (1971) 17 FLR 141.
40 See, eg, Young, above n 7, 231.
41 See Ch 6 and 7.
42 *Milirrpum v Nabalco* (1971) 17 FLR 141, 273.
43 Ibid, 270.
44 Ibid, 270.
45 For Blackburn J, the relationship did not display the 'substance' of property: the right to use or enjoy; the right to exclude others and the right to alienate: Ibid, 272.

character of the connection to land and waters were canvassed in detail in *Western Australia v Ward,*[46] and elements have been revisited in *Brown v Western Australia.*[47]

2.31 The exact nature of the connection between native title claimants and the land and waters claimed has continued to be a source of varied jurisprudential characterisation in a native title determination.[48] In turn, whether native title is a *sui generis* right has been widely canvassed in native title case law.[49]

2.32 In *Mabo [No 2]*, for example, Deane and Gaudron JJ stated that 'the preferable approach is … to recognize the inappropriateness of forcing the native title to conform to traditional common law concepts and to accept it as sui generis or unique',[50] whereas Brennan J stated that 'there is no reason why the common law should not recognize novel interests in land which, not depending on Crown grant, are different from common law tenures'.[51]

Statutory land rights

2.33 From the 1970s, attention was directed to securing land rights through legislation.[52] Following *Milirrpum,* Woodward J was appointed to inquire into the possibility of Aboriginal land rights in the Northern Territory.[53] Woodward's report gave rise to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), which established a claims process, predicated upon traditional ownership. The Act was significant as the first extensive land rights scheme in Australia. The influence of *Milirrpum* was apparent in the approach emphasising traditional spiritual attachment to land and the substantial role for anthropological evidence.

2.34 Some states established statutory land rights schemes. Nevertheless, there was resistance to a possible national land rights scheme.[54] Efforts towards a treaty proved inconclusive.[55] Concurrently, the Meriam peoples' claim in *Mabo [No 2]* was making its way through the courts in its 10-year litigation journey.[56]

The recognition and continuity doctrines revisited

2.35 By the time of the Meriam Island peoples' claim for customary rights, a number of clear threads were emerging around the revision of the manner of the recognition of the pre-existing rights of Indigenous peoples. The modern native title doctrine is based

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46 *Western Australia v Ward* (2002) 213 CLR 1. See Ch 7.
47 *Western Australia v Brown* (2014) 306 ALR 168.
48 See further Ch 5.
49 *Commonwealth v Yarmirr* (2001) 208 CLR 1. See further Ch 8.
50 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 89 (Deane and Gaudron JJ).
51 Ibid 49 (Brennan J).
52 Young, above n 7, 15.
53 AE Woodward, *Aboriginal Land Rights Commission: Second Report, April 1974* (AGP, 1975).
54 Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act' (2003) 27 *Melbourne University Law Review* 523, 531.
55 For an examination of why no treaty with Indigenous peoples developed in Australia see Sean Brennan, Brenda Gunn and George Williams, 'Sovereignty and Its Relevance to Treaty-Making between Indigenous Peoples and Australian Governments' (2004) 26 *Sydney Law Review* 307, 344.
56 Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years on* (AIATSIS, 2012) Mcintyre 15.

in common law jurisprudence, as well as a body of English customary law.[57] Broadly speaking, it comprised judicial recognition of Indigenous peoples' rights—as a form of communal 'title'—that survived annexation of a colony. [58] Scholarship had confirmed that, in a settled colony, contemporary aboriginal rights were legally cognisable through the principle of continuity without the requirement of an act of recognition by the Crown.[59]

2.36 Concurrently, a re-examination of Indigenous peoples' affairs was gathering momentum within Australia during the late 1970s and 1980s. Pivotal among these developments was the reassessment of the place of Aboriginal laws and customs.[60] The 1986 ALRC Report did not consider customary land rights in any detail but it was influential for later jurisprudence, including *Mabo [No 2]* in providing a 'recognition model' for traditional laws and customs.[61]

The framework: *Mabo [No 2]*

2.37 *Mabo [No 2]* built upon the common law jurisprudence on continuity,[62] pre-*Mabo* precedents[63] and the general attention directed to traditional laws and customs.

2.38 The High Court's decision in *Mabo v Queensland 1988* ('*Mabo [No 1]*')[64] was a necessary precursor to *Mabo [No 2]*. In turn, it relied on developments at international law that had given rise to Commonwealth anti-discrimination laws.[65] After the Meriam Island plaintiffs had lodged their statement of claim, the State of Queensland passed the *Queensland Coast Islands Declaratory Act 1985* (Qld). A majority of High Court justices held that the Queensland Act was inconsistent with s 10 of the *Racial Discrimination Act 1975* (Cth) and by operation of s 109 of the Commonwealth Constitution, thereby invalid.[66] The *Racial Discrimination Act* has continued to have an important role in the protection of native title rights and interests under the *Native Title Act*.

2.39 In *Mabo [No 2]*, the majority of the High Court declared that the pre-existing rights of the plaintiffs survived the annexation of the Meriam Islands by Great Britain.[67] Brennan J held that, although Australia was settled under the doctrine of

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57 Secher, above n 19, 21.
58 For discussion of New Zealand, see PG McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press), 85.
59 Kent McNeil, *Common Law Aboriginal Title* (Clarendon Press, 1989); cited by Brennan J in *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 39.
60 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) 86.
61 Young, above n 7, 231.
62 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 55–57.
63 For example, *Milirrpum v Nabalco* (1971) 17 FLR 141; *Walden v Hensler* (1987) 163 CLR 561; *Administration of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353.
64 *Mabo v Queensland [No 1]* (1988) 166 CLR 186.
65 Young, above n 7, 16.
66 *Mabo v Queensland [No 1]* (1988) 166 CLR 186, 214–216.
67 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 75–76 (Brennan J), 115–116 (Deane and Gaudron JJ), 192 (Toohey J). Note that Mason CJ and McHugh J agreed with Brennan J on this point.

terra nullius, it was not 'desert uninhabited' in fact.[68] The notion that Indigenous Australians were 'barbarous' or 'without a settled law' was rejected.[69]

2.40 Brennan J further noted:

> Until recent times, the political power to dispose of land in disregard of native title was exercised so as to expand the radical title of the Crown to absolute ownership but, where that has not occurred, there is no reason to deny the law's protection to the descendants of indigenous citizens who can establish their entitlement to rights and interests which survived the Crown's acquisition of sovereignty.[70]

2.41 The majority in *Mabo [No 2]* thus recognised 'a form of native title which, in cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their law and customs to their traditional lands'.[71] The acquisition of sovereignty did not require that all land vested beneficially in the Crown.[72] Rather, the Crown acquired a radical (or ultimate) title 'burdened' by native title:

> Where a proprietary title capable of recognition by the common law is found to have been possessed by a community in occupation of a territory, there is no reason why that title should not be recognized as a burden on the Crown's radical title when the Crown acquires sovereignty over that territory.[73]

2.42 Brennan J stated that 'a mere change in the sovereignty does not extinguish rights to land'.[74] However, the judgment stressed the co-extensive sovereign power of extinguishment in relation to those pre-existing rights.[75] Toohey J held that the fact of the presence of indigenous inhabitants on acquired land precludes beneficial title in the Crown: 'It is presence amounting to occupancy which is the foundation of the title and which attracts protection, and it is that which must be proved to establish title'.[76] Occupancy as the foundation of native title has not been generally accepted by Australian courts.[77]

2.43 Brennan J held that a clan or group has to continue to acknowledge and observe traditional laws and customs in order that their traditional connection with the land is

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68 For discussion see Gerry Simpson, '*Mabo*, International law, *Terra Nullius* and Stories of Settlement: An Unresolved Jurisprudence' (1993) 19 *Melbourne University Law Review* 195.

69 Accordingly, 'the preferable rule equates the indigenous inhabitants of a settled colony with the inhabitants of a conquered colony in respect of their rights and interests in land': *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

70 Ibid 53.

71 Ibid 15.

72 '[I]f the land were occupied by the indigenous inhabitants and their rights and interests in the land are recognized by the common law, the radical title which is acquired with the acquisition of sovereignty cannot itself be taken to confer an absolute beneficial title to the occupied land': Ibid 48 (Brennan J).

73 Ibid 51.

74 Ibid 57.

75 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.

76 *Mabo v Queensland [No 2]* (1992) 175 CLR 1; Richard Bartlett, 'Common Law Aboriginal Title' 15 *University of Western Australia Law Review* 293.

77 For a discussion of alternative bases see Noel Pearson, 'Land Is Susceptible of Ownership' in Marcia Langton et al (eds), *Honour Among Nations?* (Melbourne University Press, 2004) 83.

substantially maintained.[78] While acknowledging that the proof of such acknowledgement of laws and customs may involve practical constraints, the judgment contained the statement that when 'any real acknowledgment of traditional law and any real observance of traditional customs' has ceased, 'the foundation of native title has disappeared'.[79]

2.44 Sean Brennan, Brenda Gunn and George Williams note:

> *Mabo (No 2)* left the 'settlement' theory for the acquisition of Crown sovereignty undisturbed. But traditional law and custom—an additional source of law in Australia that does not derive from the Crown—was newly recognised as a coherent system. Native title adjudication henceforth would become an 'examination of the way in which two radically different social and legal systems intersect'.[80]

Native title: continuity and proof

2.45 There is an inextricable relationship between the rules of recognition and the rules on proof. Brennan J's judgment as adopted in s 223 of the *Native Title Act* set the initial rules as to what must be proved for a native title determination. In *Sampi*, French J (as he then was) referred to these as the rules of recognition: 'the common law and the Act establish the rules for determining whether native title rights and interests exist under non-indigenous law. These are the rules of recognition'.[81] The rules of recognition determine which of the rights and interests that pre-existed sovereignty will be recognised by the new sovereign. They are the interface between the common law and indigenous laws and customs.

2.46 In *Mabo [No 2]*, Brennan J had indicated that native title 'has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory'.[82] This statement, strongly affirmed in later case law, marks the adoption of the 'laws and customs' approach to 'continuity' in the recognition of native title. As Dr Paul Burke comments,

> the most fundamental choice was to adopt a 'laws and customs' approach in which ideas of 'laws and customs' become universal, cross-cultural means of recognition.[83]

2.47 In *Fejo v Northern Territory*, the High Court stated:

> Native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title. Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law.[84]

78 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 59.
79 Ibid 60. See also Perry and Lloyd, above n 75, 22–23.
80 Brennan, Gunn and Williams, above n 55, 325.
81 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005), [951].
82 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 58.
83 P Burke, *Submission 33*.
84 *Fejo v Northern Territory* (1998) 195 CLR 96, [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

2.48 This was a hybrid model of the doctrine of recognition and continuity.[85] Secher notes that by 'combining aspects of the continuity and recognition doctrines, Brennan J's conclusion on the effect of the change in sovereignty on pre-existing land rights in Australia effectively reconciled these two formerly distinct doctrines and replaced them with a singular doctrine: continuity pro tempore'.[86] The hybrid model meant that English land law did not apply upon sovereignty to the pre-existing rights and thereby placed stronger emphasis on the need to demonstrate continued acknowledgement of laws and customs than the doctrine originally derived from British Imperial law.[87] The doctrine of continuity had originated in the Imperial law context as principles that allowed two legal systems to co-exist, albeit with one system having supremacy. The rules that the existing laws continued until abrogated, had evolved to require positive proof of the factual existence of laws and customs.

> As to proof of native title, there was no presumption of continuance and a requirement was imposed that particular traditional laws and customs must continue to be observed …[88]

2.49 This requirement for factual confirmation of the 'continuity of laws and customs' is embedded in the proof of native title in the *Native Title Act*. Thus, while *Mabo [No 2]* provided an important foundation for recognising native title within Australian law, it set in place a model that was susceptible to introducing particular stringencies with respect to proof. The emphasis on the need for Aboriginal or Torres Strait Islander claimants to provide evidence of the acknowledgment of traditional laws and customs, was to develop into strict requirements for continuity from the pre-sovereign period, and in emphasising 'normativity' in *Yorta Yorta*.[89]

2.50 The jurisprudence also set up an implicit problem of the degree of change or evolution that may be possible in traditional laws and customs. Subsequently, the doctrine of continuity was further reshaped under statutory construction of the *Native Title Act*,[90] which would lead to extensive judicial analysis of what constitutes a substantial interruption to the acknowledgment of law and custom. This reshaping has amplified the requirements for proof of native title. These issues are considered in greater detail in Chapters 4–7.

After the Mabo decision

2.51 The *Mabo [No 2]* decision remains remarkable in that it navigated a path between extremes:

> On the one hand, the implications of sovereignty and the demand for a coherent skeleton of principle in the law prevented a wholesale reappraisal of Australian land

85 Secher, above n 19, 29.
86 Ibid 107. Ch 3 provides an extensive overview of the reception of land law in Australia.
87 Ibid.
88 Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 3rd ed, 2015) 984.
89 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
90 Secher, above n 19, 324.

> law. On the other hand, the demands of justice prevented a simple confirmation of the extinguishment of all Indigenous rights to land.[91]

2.52 The decision retained central principles of the Australian land law, resources and property law systems,[92] and the constitutional basis of the Australian nation,[93] while allowing the recognition of Aboriginal and Torres Strait Islander peoples native title rights and interests in lands and waters.

2.53 The Western Australian Government acknowledged its significance in that

> the present concepts of native title derive from *Mabo No 2*, and, in turn, from Australia's unique political and legal history, including its history of European settlement. Any proposed changes to the native title system, especially any changes to s 223(1) of the NTA, must take into account these historical foundations of native title.[94]

2.54 The recognition model drawn from *Mabo [No 2]* and common law jurisprudence but refocused upon traditional laws and customs set the basis for the subsequent development of native title law.[95]

The *Native Title Act*

Negotiating the legislation

2.55 The decision in *Mabo [No 2]* was followed by proposed Australian Government legislation.[96] The High Court's decision was seen by the government of the day as 'a practical building block of change' and the 'basis of a new relationship'.[97] A draft Commonwealth report proposed a statutory framework for native title, with a specialist statutory tribunal to adjudicate claims and the negotiation of settlements.[98] There was a period of intense negotiations between all stakeholders and the Commonwealth government, with various compromises reached.[99]

2.56 Australia's federal system of government has played an important role in the evolution of the law and the institutions under the *Native Title Act*.[100] The Act reflected the need to balance Aboriginal and Torres Strait Islander interests, the proposals for

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91 Alex Reilly, 'From a Jurisprudence of Regret to a Regrettable Jurisprudence: Shaping Native Title from Mabo to Ward' (2002) 9 *E Law Journal: Murdoch University* [21].

92 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 29.

93 See Brennan, Gunn and Williams, above n 55, 314.

94 Western Australian Government, *Submission 20*.

95 Young, above n 7, 234.

96 Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act' (2003) 27 *Melbourne University Law Review* 523, 538.

97 The Hon Paul Keating, 'Speech by the Honourable Prime Minister, PJ Keating MP, Australian Launch of the International Year of the World's Indigenous Peoples, Redfern, 10 December 1992' (1993) 3 *Aboriginal Law Bulletin* 4.

98 'Mabo: The High Court Decision on Native Title' (Commonwealth of Australia, Inter-departmental Committee, June 1993). A series of financial measures, such as a justice and economic development package were also proposed in this report.

99 Bauman and Glick, above n 56, chs 7–11.

100 For an outline of the various positions see Tehan, above n 54; Sean Brennan, 'Native Title in the High Court of Australia a Decade after Mabo' (2003) 14 *Public Law Review* 209.

significant state involvement in the processes under the Act, and industry concerns for 'certainty'—all within the overarching Commonwealth framework.[101]

Overview of the Act

2.57 The legislation was seen as an opportunity 'to do justice to the Mabo decision in protecting native title and to ensure workable, certain, land management'.[102] It was, 'enacted against the fabric of the common law'.[103] The *Native Title Act* was passed in late 1993.[104] Broadly, it did four things:

- it validated past grants and legislation to give full effect to Crown grants made before 1 January 1994 or legislation passed before 1 July 1993;
- it enacted a 'future acts regime';
- it gave effect to state and territory jurisdiction; and
- it vested powers to determine native title in the Federal Court and the new National Native Title Tribunal.[105]

2.58 The *Native Title Act* operates within Australia's federal system of government with divided, but at times overlapping, spheres of legislative powers and executive responsibilities between the Commonwealth and state and territory governments.[106] The powers to grant interests of land in the tenure-based system of land law rest with state governments, as the inheritors of the colonial land law structures.[107] In conjunction, state and territory governments have extensive land management, environmental protection, infrastructure provision, land use planning and other responsibilities that interface with native title rights and interests.[108]

2.59 The *Native Title Act* is a valid exercise of the Commonwealth's legislative power pursuant to s 51(xxvi) of the *Constitution.*[109] As valid Commonwealth legislation, pursuant to s 109 of the *Constitution*, it is binding upon the states and territories.[110]

2.60 In 1998 the Act was significantly amended under the 'Wik 10 point plan' that, among other amendments, extended the validation and confirmation regime.[111] Amendments removed the power to make determinations of native title from the

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101 Tehan, above n 54.
102 Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2878 (Paul Keating).
103 Perry and Lloyd, above n 75, 3.
104 For an outline of the various positions see Tehan, above n 54; Brennan, above n 100.
105 *Native Title Act 1993* (Cth) Preamble.
106 Richard H Bartlett, *Native Title in Australia* (Butterworths, 2nd ed, 2004) 88.
107 *Walker v State of South Australia (No 2)* [2013] FCA 700 (19 July 2013) [29].
108 See, eg, Lisa Strelein, *Dialogue About Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010).
109 The relevant power operates in respect of 'the people of any race for whom it is deemed necessary to make special laws' *Commonwealth of Australia Constitution Act* (Cth) s 51 (xxvi).
110 *Western Australia v Commonwealth* (1995) 183 CLR 373, [79].
111 *Native Title Amendment Act 1998* (Cth).

National Native Title Tribunal to the Federal Court.[112] Minor amendments were made to the definition of native title, relating to statutory access rights.[113] Section 225, which outlines matters that must be included in a determination of native title, was amended to require additional precision as to both the holders of the native title and the nature and extent of that native title.

Construing s 223 of the *Native Title Act*

2.61 The definition of native title in s 223 of the *Native Title Act* was not intended to codify common law,[114] but the foundation of the provision was the decision of Brennan J in *Mabo [No 2]*.[115] The High Court later emphasised that a claim for native title is made under the *Native Title Act* for rights and interests defined under the Act. A determination of native title must be made in accordance with the requirements of s 225.[116] In *Yarmirr*, the High Court stated that subsections 223(1)(a) and (b) of the Act must establish that the rights and interests 'do in fact exist'.[117]

2.62 The *Native Title Act* provides the framework in which the facts in the other normative system—Aboriginal and Torres Strait Islander law and custom—must be proved. At the heart of proof in native title, there is a complex, cross-system translation occurring between the legal rules in the legislation that set the 'test' and the facts in the Aboriginal and Torres Strait Islander 'system' that must form the evidence to satisfy that test for recognition. Recognition is now an element of the statutory definition of s 223(1).[118]

2.63 In 2002, French J, writing extra-curially, suggested that the case law of the time, 'foreshadow[ed] limited development of the common law'.[119] Debate remains as to whether the earlier common law centred on *Mabo [No 2]* has been superseded by statutory construction—as well as the consistency of statutory construction with the intent evidenced in the Preamble of the Act. The precise relationship between the interpretation of a statutory provision and the common law may often remain ambiguous. Francis Bennion has stated:

> The common law system of statutory interpretation is not just going by the words alone (literal interpretation) or applying rules of thumb … but something much more difficult and pluralistic.[120]

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112 See *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245.

113 *Native Title Act 1993* (Cth) ss 223(3) and 223(3A).

114 Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2879 (Paul Keating).

115 *Western Australia v Ward* (2002) 213 CLR 1, [16] (Gleeson CJ, Guadron, Gummow and Hayne JJ).

116 Ibid. See also *Western Australia v Commonwealth* (1995) 183 CLR 373; *Fejo v Northern Territory* (1998) 195 CLR 96; *Commonwealth v Yarmirr* (2001) 208 CLR 1.

117 *Commonwealth v Yarmirr* (2001) 208 CLR 1.

118 Ibid; *Western Australia v Ward* (2002) 213 CLR 1; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

119 Justice Robert French, 'Western Australia v Ward: Devils and Angels in the Detail' (Paper Presented at the Native Title Conference 2002, Geraldton).

120 Francis Bennion, 'The Global Method: Statutory Interpretation in the Common Law World' (2000) 82 *Commonwealth Legal Education Association Newsletter* 30, 33.

2.64 The task of construing 'connection' in the *Native Title Act* therefore is a complex one. Gageler J, writing extra-curially, contends that the current approach in Australia to statutory construction is one of 'literal in total context'.[121] This accords to the view that 'connection in this context extends beyond the specific question of connection addressed in s 223(1)(b) and encompasses the whole matter of proving native title rights and interests'.[122]

2.65 The ALRC considers that adopting the literal wording of s 223 of the *Native Title Act* as the starting point for construing native title is important. In turn, the ALRC considers that there remains a role for construing the statute against the 'total context' of its common law jurisprudential heritage, particularly as the Act is beneficial legislation, to be given a liberal interpretation.

Interpretation of s 223(1)

2.66 The approach that proof of native title must begin with the definition in the Act, has not simplified the interpretation of s 223(1). Over time, an expanded set of requirements for determining native title has been articulated beyond the 'elements' contained in the express definition of native title.[123] Commentators have noted the highly technical character of native title law and its complexity.[124]

2.67 Regardless of the underlying jurisprudential position, the practical outcome has been that there are new matters requiring evidence, certainly beyond those indicated either by the judgments in *Mabo [No 2]* or the strict words of s 223(1).

2.68 Several submissions to this Inquiry noted the difficulties for all parties that these additional requirements have imposed.[125] Other submissions suggested that connection requirements in themselves no longer constitute a significant difficulty for claim resolution.[126]

2.69 The precise manner in which amplification of requirements for proof of native title occurs and the ALRC's recommendations that address this are dealt with in detail in later chapters. Here, the ALRC's discussion turns to four general matters related to the interpretation of the definition of s 223 of the *Native Title Act* that reflect the legacy of the laws and customs approach to recognising native title. These areas are the

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121 Stephen Gageler, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37 *Monash University Law Review* 1, 1.

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

123 Justice French, in an extra-curial comment, noted that the turn to the statute also involved extensive re-interpretation of the terms within s 223. Justice Robert French, 'Western Australia v Ward: Devils and Angels in the Detail' (Paper presented at the Native Title Conference 2002, Geraldton).

124 Tehan, above n 54, 556.

125 Kimberley Land Council, *Submission 30*; Queensland South Native Title Services, *Submission 24*; A Frith and M Tehan, *Submission 12*; Cape York Land Council, *Submission 7*; Australian Human Rights Commission, *Submission 1*.

126 Northern Territory Government, *Submission 31*; Central Desert Native Title Services, *Submission 26*; Chamber of Minerals and Energy of Western Australia, *Submission 21*; Western Australian Government, *Submission 20*.

subject of the package of recommendations in Chapters 4–8, identified by the ALRC as the most appropriate and clearly targeted of the options for reform.

Traditional laws and customs

2.70 An expanded exposition of the 'connection requirements' for proof of native title culminated in *Yorta Yorta*,[127] centred upon 'traditional'.[128] Recognition cannot be accorded to laws and customs which are not traditional; these must pre-exist sovereignty and only normative rules are 'traditional'.[129] This concept is at the core of a recognition model based upon a 'laws and customs' approach. The emphasis upon discerning the facts about a 'subtle and elaborate system of social rules and customs'[130] can be traced back to *Milirrpum* and its antecedents.[131]

2.71 Yet few stakeholders supported removal of 'traditional' from the definition of native title. 'Traditional' appears firmly embedded in native title law—not surprising, given the long history of its use within the Australian 'laws and customs' framework and its importance for Aboriginal people and Torres Strait Islanders. Accordingly, the ALRC considers it assists certainty in the native title claims process to retain 'traditional', but to confirm that traditional laws may evolve, adapt and develop. Further, the ALRC confirms in Chapter 5 that native title rights and interests may be transmitted, transferred or otherwise acquired between Aboriginal or Torres Strait Islander groups in accordance with the traditional laws and customs of those groups.

2.72 These recommendations address the dilemma of change but allow retention of the pre-sovereign origins for traditional laws and customs in a measured way.

Continuity over an extended time frame

2.73 The Federal Court in *Bodney v Bennell* stated:

> Because it is the normative system that is the source of the rights and interests, it is necessary in order to prove native title that the normative system has had a continuous existence and vitality since sovereignty.[132]

2.74 The strict requirement of continuity of acknowledgment of traditional laws and customs is qualified by the phrase 'substantially uninterrupted'. This phrase is not found in the words of s 223. The word 'substantially' recognises that some interruption is permissible because of the effects of European settlement.[133] The law is discussed in detail in Chapters 4, 5 and 6.

2.75 Under the *Native Title Act*, the legal determination of rights and interests possessed under laws and customs with origins in the pre-sovereign period is deferred

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127 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
128 Ibid [46]–[47].
129 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
130 *Milirrpum v Nabalco* (1971) 17 FLR 141.
131 P Burke, *Submission 33*.
132 *Bodney v Bennell* (2008) 167 FCR 84, [47].
133 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [89].

for some 200 years.[134] This poses an acute practical and metaphysical problem of proof for native title claimants.[135] It contributes to the high transaction costs experienced by all parties involved in determining native title 'connection'. There are inherent difficulties in producing evidence of a long-distant past and connecting it to the present.

The scope of native title rights and interests

2.76 The nature of native title under the *Native Title Act* has been framed against the questions of the extinguishment of native title rights and interests.[136] This view has tended towards the susceptibility to extinguishment of native title rights and interests[137] and a narrowing of the scope of native title rights and interests.

2.77 Another view is possible, where extinguishment is the 'obverse of recognition'.[138] In *Akiba*, French CJ and Crennan J held that

> 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.[139]

2.78 This view affirms the continued vitality of rights and interests under traditional laws and customs notwithstanding that these may not have 'translated' across the normative divide. It offers a model for recognition closer to the continuity model where rights and interests in the pre-existing legal system continued until abrogated by the common law.

2.79 As this chapter demonstrates, there has been a long standing pre-occupation in the Australian legal system and its colonial forebears with the factual character of Aboriginal and Torres Strait Islander peoples' laws and customs. The ALRC's recommendations in Chapter 5 acknowledge that linking between the pre-sovereign laws and customs and their modern counterpart is necessary, but the targeted recommendations are directed to reducing the impact of those requirements where they have introduced more stringency than may be evident from the text of the definition of native title in s 223(1).

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134 The date of sovereignty varies in different parts of Australia—for example, it is 1788 for eastern Australia and 1829 for Western Australia. However, it was much later for the Torres Strait, ranging from 1872 to 1879: Bartlett, above n 88, 216–217; Department of Natural Resources and Mines, Queensland, *Guide to Compiling a Connection Report for Native Title Claims in Queensland* (Department of Natural Resources and Mines, Queensland, 2013) 20–22.

135 The metaphysical problem arises in that there can never be an absolute correlation between evidence of the past and that past—a problem exacerbated by such a long interval of time.

136 *Western Australia v Ward* (2002) 213 CLR 1; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; *Akiba v Commonwealth* (2013) 250 CLR 209; *Western Australia v Brown* (2014) 306 ALR 168.

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

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

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

A society united in and by its acknowledgment of laws and customs

2.80 Section 225 of the *Native Title Act* requires that any determination of native title must specify 'who the persons or each group of persons, holding the common or group rights comprising native title are'.[140] This derives from the requirement in *Mabo [No 2]* of an 'identifiable community'.[141] The language of 'normative system' was not used. The term 'society' is neither found in *Mabo [No 2]*, nor the words of s 223.[142]

2.81 In *Yorta Yorta*, the majority held that a 'society is to be understood as a body of persons united in and by its acknowledgment and observance of a body of laws and customs'.[143] Those laws and customs must have a normative quality. The concept of the acknowledgment of law, derived from United States constitutional jurisprudence on the nature of law, has come to govern the laws and customs 'test' for native title.

2.82 This chapter has outlined how pervasive the 'laws and customs' approach has been in Australian native title law. Accordingly, the ALRC has adopted a flexible approach to the concept of a normative society, promoting certainty by allowing the concept to do some useful work in identifying coherent groups at a number of levels, but not treating it as a strict requirement for proof.

2.83 The shift away from recognising native title rights and interests to a focus on a normative society that acknowledges traditional laws and customs is apparent in the current requirements to meet s 223(1):

> [The claimants] are a society united in and by their acknowledgment and observance of a body of accepted laws and customs;
>
> [T]hat the present day body of accepted laws and customs of the society, in essence, is the same body of laws and customs acknowledged and observed by the ancestors or members of the society adapted to modern circumstances; …
>
> [T]hat the acknowledgment and observance of those laws and customs has continued substantially uninterrupted by each generation since sovereignty and that the society has continued to exist throughout that period as a body united in and by its acknowledgment and observance of those laws and customs[; and]
>
> The claimants must show that they still possess rights and interests under the traditional laws acknowledged and the traditional customs observed by them and that those laws and customs give them a connection to the land.[144]

2.84 Perhaps most simply, the above 'test' illustrates the amplified elements for proof that have developed in construing the definition of native title in s 223 of the *Native Title Act*. The definition, however, on one view contains relatively straightforward concepts—rights and interests in land and waters which are possessed under traditional laws and customs; acknowledgment of those laws and observance of customs since the

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140 *Native Title Act 1993* (Cth), s 225(a).
141 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 61 per Brennan J; 86 per Deane and Gaudron JJ.
142 *Bodney v Bennell* (2008) 167 FCR 84, [46].
143 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [51]-[53].
144 *Far West Coast Native Title Claim v South Australia (No 7)* [2013] FCA 1285 (5 December 2013) [38]–[39] as affirmed in *Starkey v South Australia* [2014] FCA 924 (1 September 2014) [40]; *Apetyarr v Northern Territory of Australia* [2014] FCA 1088 (14 October 2014) [17]–[18].

assertion of sovereignty, giving rise to the connection that Aboriginal peoples and Torres Strait Islanders have with land and waters. The rights and interests are recognised by the common law. The High Court in *Ward*, noted that these elements have remained constant in the definition.[145]

2.85 The Law Council of Australia noted in its submission

> that Courts should be able to interpret s 223 of the *Native Title Act* flexibly; rather than in a technical and restrictive manner. Change over time to the pre-sovereignty society should not, of itself, result in the dismissal of a native title application.[146]

2.86 The ALRC considers that in the light of the beneficial purposes of the legislation that it is important to refocus on these core elements of the definition. The ALRC makes recommendations in Chapter 5 that are designed to allow s 233 to be construed flexibly, adopting a 'literal in context' approach to the *Native Title Act*.

Laws, customs and change

2.87 A significant contemporary challenge in native title law is the question of change and adaptation in indigenous communities. The extent to which traditional laws and customs can evolve or adapt is set against a system of proof that requires tradition and a continuous connection to a pre-sovereign past as the basis for entitlement.

2.88 This legal model can be contrasted with the growing acknowledgement in practice that Aboriginal and Torres Strait Islander peoples and their relationships with land and waters, can and do adapt to changing circumstances; the influence of European settlement makes that inevitable.[147]

2.89 This Inquiry has not disturbed the basic proposition that native title rights and interests that are recognised must be possessed under laws and customs with origins in the pre-sovereign period. That proposition is now fundamental to the *Native Title Act*. The ALRC's review has engaged with the question of the degree of permissible evolution and development of laws and customs. The Terms of Reference for this Inquiry require such reflection.

2.90 Further, where legislation is identified as being beneficial, the High Court has stated that such legislation should be given a 'fair, large and liberal' interpretation, rather than one which is 'literal or technical'.[148]

2.91 In summary, the recommendations around connection requirements are designed to:

- accord with the object of the recognition and protection of native title rights and interests under the *Native Title Act*;

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145 *Western Australia v Ward* (2002) 213 CLR 1, [17].

146 Law Council of Australia, *Submission 64*. See also Law Council of Australia, 'Policy Statement on Indigenous Australians and the Legal Profession' (Background Paper, February 2010).

147 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2012' (Australian Human Rights Commission, 2012).

148 *IW v City of Perth* (1997) 191 CLR 1, 12 (Brennan CJ, McHugh J); 39 (Gummow J). See also *AB v Western Australia* (2011) 244 CLR 390, [24].

- give greater attention to how Aboriginal people and Torres Strait Islanders frame their relationship to country;
- reduce the complexity of the law around connection requirements;
- expedite the claims process by a refocus on core elements of the definition of native title;
- provide statutory reflection of the evolving law on the nature and content of native title rights and interests; and
- give closer attention to the common law doctrines that were drawn upon in *Mabo [No 2]* to form the basis for interpretation of the text in s 223.

International law

2.92 A consideration of international law is also useful to examine perspectives on how the rights of Indigenous peoples have changed over time. International law has progressively articulated more tangible human rights and freedoms for Indigenous peoples.

2.93 International law has relevance to native title claims at a number of levels. This provides the context for examining the specific issues in relation to connection requirements and proof of native title, addressed in Chapters 4–8 of this Report.

2.94 Finally, the section explores how international law may provide principles to guide the future evolution of native title law to support sustainable, long-term development for Aboriginal and Torres Strait Islander peoples.

2.95 The ALRC is to have particular regard to international law in its inquiries under its enabling legislation.[149] The Terms of Reference for the Inquiry identified Australia's statement of support for the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP')[150] as a contextual factor for consideration.

International law and Indigenous peoples

2.96 The acknowledgment of Indigenous peoples as a distinct cultural group and polity at international law has accelerated. In 2009, James Anaya, Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples, noted, 'groups identified as indigenous peoples are now important subjects of concern within the international program to advance rights'.[151]

2.97 Attention to the rights of Indigenous peoples emerged from the earlier platform promoting human rights and freedoms in international law in the mid-20th century.[152] The earliest international instruments focused upon individual political and civil rights.

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149 See Guiding Principle 4, Ch 1.

150 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

151 S James Anaya, *International Human Rights and Indigenous Peoples* (Aspen Publishers, 2009) 1.

152 Alexandra Xanthaki, 'Indigenous Rights In International Law Over The Last Ten Years And Developments' (2009) 10 *Melbourne Journal of International Law* 27.

'Second generation' rights encompass economic, social and cultural rights. The protections afforded on a cultural basis in such instruments tend to stress 'rights to culture', such as access to education and cultural expression, rather than rights held as a distinct cultural or collective group.

2.98 'Third generation' rights, which include collectively-held group rights, have expressly included Indigenous peoples' rights.[153] Increasingly, the norms underpinning human rights have been adopted in relation to Indigenous peoples:

> This evolutionary international law and policy has provided virtual ground for a new and still developing regime of international standards and institutional activities specifically concerning the rights of indigenous peoples.[154]

2.99 The UNDRIP was adopted by the United Nations in 2007.[155] As a Declaration of the General Assembly, it is non-binding on state parties, but its significance extends beyond its formal legal status.[156]

2.100 The United Nations also has given emphasis to Indigenous peoples' rights in its administrative machinery. Several bodies have been established that are dedicated to Indigenous peoples, including the Expert Mechanism on the Rights of Indigenous Peoples, the Special Rapporteur and the Permanent Forum on Indigenous Issues.[157]

2.101 Early human rights instruments, such as the *International Covenant on Civil and Political Rights*,[158] remain of importance for Indigenous peoples. The relevance of earlier Conventions has been re-entrenched as matters pertaining to Indigenous peoples have become prominent in United Nations forums. The Committee operating under the auspices of the *International Convention on the Elimination of All Forms of Racial Discrimination*,[159] for example, undertakes specific monitoring of indigenous issues.[160]

Adoption of treaties relevant to native title

2.102 Australia entered into a series of United Nations Conventions in the mid-20th century, which sought to give acknowledgement under international law to civil, political and cultural rights,[161] and to address various forms of discrimination.[162] The

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153 George Williams and David Hume, *Human Rights under the Australian Constitution* (OUP, 2nd ed, 2013) 4.

154 Anaya, above n 151, 2.

155 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

156 Megan Davis, 'Adding a New Dimension: Native Title and the UN Declaration on the Rights of Indigenous Peoples' [2009] *Australian Law Reform Commission Reform Journal* 17.

157 Xanthaki, above n 152, 28.

158 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

159 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

160 Xanthaki, above n 152, 27–28.

161 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

162 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

ALRC report *Recognition of Aboriginal Customary Laws* in 1986 indicated that the *International Covenant on Civil and Political Rights* put into effect internationally accepted principles of equality and non-discrimination.[163] Australia also signed the *International Covenant of Economic Social and Cultural Rights* ('ICESCR'), ratifying the Convention in 1975 with no reservations.[164]

2.103 Accordingly, Australia has international obligations in respect of Aboriginal peoples and Torres Strait Islanders under a range of binding international law instruments. The use of the external affairs power in the Commonwealth Constitution to support legislation giving effect to international obligations, where the measures are proportionate, has been confirmed.[165] International developments in human rights law have informed Australian law and native title.[166]

2.104 The framework of human rights and international law, such as the monitoring process under the *International Convention on the Elimination of All Forms of Racial Discrimination* ('CERD'), has continued to be of relevance to native title.[167] The CERD Committee has raised concerns about the strict regime of proof under the *Native Title Act*.[168] The UN ICESCR Committee noted the high cost, complexity and strict rules regulating native title claims, and the inadequate protection of indigenous cultural and intellectual property and language, in accordance with art 15 of that Covenant.[169]

Convention on the Elimination of All Forms of Racial Discrimination

2.105 In 1975, the Australian Government ratified the CERD.[170] This Treaty was given domestic effect in the *Racial Discrimination Act 1975* (Cth).[171] In Australian law, treaties do not have the force of law unless they are given effect by statute.[172] Under art 1(4) of the CERD, an allowance is made for '[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or

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163 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) 95.

164 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

165 Australian Government Attorney-General's Department, 'Australia's Human Rights Framework' (2010).

166 Davis, above n 156.

167 The Committee on the Elimination of Racial Discrimination expressed serious concerns over the major amendments to the *Native Title Act* in 1998: Committee on the Elimination of Racial Discrimination, *Decision No 2(54) on Australia*, UN Doc A/54/18, 18 March 1999.

168 In 2010 the CERD Committee considered the fifteenth to seventeenth periodic reports of Australia in August 2010. CERD's recommendations included amending the *Native Title Act* 1993 to address the high standards of proof required for recognition of the relationship between Indigenous peoples and their traditional lands.

169 UN Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, 42nd Sess, UN Doc E/C.12/AUS/CO/4 (12 June 2009) [32].

170 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

171 The Act was held to be a valid exercise of the s 51(xxix) (the external affairs power) in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

172 Treaties must be directly incorporated into domestic law. See *Dietrich v The Queen* (1992) 177 CLR 292, 305.

individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms'.[173]

2.106 Section 8 of the *Racial Discrimination Act 1975* (Cth) imports this aspect of the Convention and allows for the enactment of 'special measures'. The High Court has considered the operation of the *Racial Discrimination Act* in native title cases.[174] Section 10 of the *Racial Discrimination Act* establishes 'equality before the law'.[175]

2.107 The majority judgments in *Mabo [No 2]* drew on international law and evolving human rights precepts, together with concepts of equality and social justice. Brennan J noted that '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'.[176]

2.108 The Preamble of the *Native Title Act* references international law, 'recognising international standards for the protection of universal human rights and fundamental freedoms.[177] The *Native Title Act* was held to be a valid exercise of the race power in *Western Australia v Commonwealth*.[178]

United Nations Declaration on the Rights of Indigenous Peoples

2.109 The *UN Declaration on the Rights of Indigenous Peoples* represented the culmination of over 20 years of negotiations by Indigenous peoples for the acceptance of their distinctive status under international law.[179] Commentators suggest that 'the orthodox view seems to be that they are not new or special rights but an extension of what already exists in the human rights universe'.[180] The UNDRIP is seen as a contextualised elaboration of general human rights principles 'as they relate to the specific historical, cultural and social circumstances of indigenous peoples'.[181]

2.110 The Law Council of Australia has adopted the position that

> The UNDRIP, whilst lacking the status of a binding treaty, embodies many human rights principles already protected under international customary and treaty law and sets the minimum standards for States Parties' interactions with the world's indigenous peoples.[182]

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173 For further detail see Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986), 111.
174 See eg *Mabo v Queensland [No 1]* (1988) 166 CLR 186.
175 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986), 113.
176 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 41–2.
177 *Native Title Act 1993* (Cth) Preamble.
178 *Western Australia v Commonwealth* (1995) 183 CLR 373, 460–462.
179 Davis, above n 156.
180 Megan Davis, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 *Australian International Law Journal* 17, 27.
181 S James Anaya, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People' (UN Doc A/HRC/9/9, 11 August 2008) 24 [86].
182 Law Council of Australia, above n 146, 6.

2.111 The UNDRIP addresses specific concerns relating to indigenous life, integrity and security and territories.[183] The UNDRIP also includes provisions dealing with the capacity of Indigenous peoples to decide upon the membership of groups and issues of identity, and for the adoption of wide participatory and consultative norms for third parties in their dealings with Indigenous peoples.[184] A range of articles within the UNDRIP relate to indigenous rights to traditional lands and resources.

2.112 The National Congress of Australia's First Peoples in its submission to the Inquiry[185] noted the following Articles:

> Article 25
>
> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.
>
> Article 26
>
> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
>
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
>
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.
>
> Article 27
>
> States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.
>
> Article 32
>
> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
>
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

183 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) arts 3,4.

184 Ibid art 33.

185 National Congress of Australia's First Peoples, *Submission 32*.

> 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Australia's statement of support on the UNDRIP

2.113 The UNDRIP was adopted by the UN General Assembly in New York on 13 September 2007.[186] Subsequently, the Australian Government issued a formal statement of support for the UNDRIP on 3 April 2009.[187] The prevailing view appears to be that UNDRIP, as a whole, does not have the status of customary international law.[188]

2.114 International law may be used by courts when construing the meaning of a statute or in instances of statutory ambiguity.[189] The High Court has referred to the UNDRIP in recent decisions, but on a fairly narrow basis.[190] Professor Davis advocates a positive role for the UNDRIP in statutory construction. The UNDRIP could, she suggests, 'help to shift the dynamics of disputes so that the burden of proof was not always placed on indigenous peoples but rather on states'.[191]

Standard setting

2.115 The Australian Government and Australian Human Rights Commission delivered a joint statement at the United Nations Permanent Forum on Indigenous Issues in 2013, expressing commitment to

> assisting Aboriginal and Torres Strait Islander peoples to achieve improved outcomes … [and] working with the Australian Human Rights Commission and the National Congress of Australia's First Peoples to increase awareness of, and encourage dialogue about, the Declaration in policy development, program implementation and service delivery as a way to embed the Declaration in how business is done.[192]

2.116 Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda has said:

> I believe the 'principled' approach presents the most opportunities in the Australian context. I believe approaching the challenge of implementation through the principles rather than addressing each article individually will provide an analysis that is better understood by a broader cross section of Government and the community. Over and

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186 Australia was one of four countries to vote against the Declaration in the UN General Assembly (with Canada, New Zealand and the US).

187 The Hon Jenny Macklin, MP, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Speech Delivered at Parliament House, Canberra, 3 April 2009).

188 See generally Davis, above n 180.

189 *Acts Interpretation Act 1901* (Cth) s 15AB.

190 Patrick Wall, 'The High Court of Australia's Approach to the Interpretation of International Law and Its Use of International Legal Materials in *Maloney v the Queen* [2013] HCA 28' (2014) 15 *Melbourne Journal of International Law* 1, 18–19.

191 Davis, above n 179, 38, quoting *Report of the International Expert Group Meeting on the Role of the Permanent Forum on Indigenous Issues in the Implementation of Article 42 of the United Nations Declaration on the Rights of Indigenous Peoples* E/C.19/2009/2.

192 Joint Statement by the Australian Government and the Australian Human Rights Commission, Agenda Item 7: Implementation of the Declaration on the Rights of Indigenous Peoples, United Nations Permanent Forum on Indigenous Issues Twelfth Session, New York, 20–31 May 2013, 2.

> over I have said that the Declaration is not a program of work, it is a way of doing things or a process based on principles.[193]

2.117 The Commissioner stressed that a key principle was 'participation in decision-making, underpinned by free, prior and informed consent and good faith'.[194]

2.118 Relevantly, the UNDRIP requires that 'States, in consultation and cooperation with Indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration'.[195]

2.119 The ALRC considers that a principled approach to developing best practice standards is an important consideration in a review of the *Native Title Act.* Its recommendations are developed in the light of the beneficial purposes of the Act, including its underpinning framework of international obligations referred to in the Preamble. The ALRC's recommendations also reflect, where appropriate, emerging international best practice standards.

International law and sustainable futures

2.120 Professor Megan Davis argues that in the absence of entrenched rights and protections in Australia for indigenous peoples, 'international standards whether binding or non-binding have had persuasive authority in the Australian legal and political system'.[196] The standards in the UNDRIP may assist the move towards sustainable, long-term social, economic and cultural development for Aboriginal and Torres Strait Islander peoples.

2.121 The UNDRIP principles may also provide the platform for engagement around native title issues, particularly as concepts such as free prior and informed consent and other norms of consultation and participation embodied in the UNDRIP become not only 'a way of doing business', but a principled way of moving forward. International jurisprudence around these aspects of the UNDRIP is developing rapidly.

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193 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice and Native Title Report 2013' (Australian Human Rights Commission) 92; see also National Congress of Australia's First Peoples, *Submission 32*.

194 See the website of the Australian Human Rights Commission: <https://www.humanrights.gov.au/>.

195 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) art 38.

196 Davis, above n 180, 48.