4. Defining Native Title

Contents

Summary

4.1 This chapter sets out the legal requirements to establish native title rights and interests—commonly referred to a 'connection requirements'. It outlines the definition of native title in s 223 of the *Native Title Act* (Cth) ('*Native Title Act*') and sets out major judicial statements on its interpretation. Satisfying the definition of native title has been said to impose an 'onerous' burden of proof on claimants, particularly in light of jurisprudence interpreting what is required to satisfy the definition.[1]

4.2 This has led to calls for reform that relate to both the means of proving native title, and the substantive legal test for establishing native title. The ALRC was directed to consider both of these issues under its Terms of Reference. The ALRC considers that aspects of the definition of native title should be reformed to better align it with the beneficial purpose of the Act. This chapter identifies these aspects, and summarises the ALRC's recommendations for reform. Justifications for these recommendations are fully developed in subsequent chapters.

4.3 Briefly, the ALRC recommends that there be explicit acknowledgment in the *Native Title Act* that traditional laws and customs may adapt, evolve or otherwise develop. The ALRC also makes recommendations addressing the degree of continuity of acknowledgment and observance of traditional laws and customs that is required to establish native title. Additionally, the ALRC recommends that the definition of native title be amended to make clear that native title rights and interests may be succeeded to by another Aboriginal or Torres Strait Islander group, where these rights and interests have been transmitted, transferred or otherwise acquired in accordance with traditional laws and customs. In relation to the nature and content of native title rights and

1 Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 3rd ed, 2015) 232.

interests, the ALRC recommends that it be made clear that native title may comprise a right that may be exercised for any purpose, including commercial purposes, and that the native title may include a right to trade.

Establishing native title rights and interests

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

4.4 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.[2]

4.5 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 traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory'.[3]

4.6 Brennan J set out the conditions for the continuation 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;[4] and
- it has not been extinguished by the valid exercise of sovereign power.[5]

4.7 However, where 'any real acknowledgment of traditional law and any real observance of traditional customs' has ceased, 'the foundation of native title has disappeared'.[6]

4.8 As discussed below, the question of what claimants must establish to demonstrate that the foundation of native title remains has become pivotal to the jurisprudence of native title. In particular, issues of continuity of acknowledgment and observance of laws and customs and the extent of adaptation of laws and customs have been considered at length in determinations of native title, and are a focus of this Report's recommendations in relation to connection requirements.[7]

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2 *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 Ch 2.

3 Ibid 58.

4 Ibid 59.

5 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.

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

7 See Chs 5, 6 and 7 for further discussion.

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

4.9 Following *Mabo [No 2]*, the *Native Title Act* was enacted to provide, among other things, a mechanism for determining native title.[8]

4.10 Section 223 of the *Native Title Act* provides a definition of native title, based on Brennan J's judgment in *Mabo [No 2]*.[9] 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.

4.11 To establish that they hold native title, Aboriginal or Torres Strait Islander peoples must satisfy the definition of native title in s 223(1). In other words, they bear the onus or burden of proving each of the elements of s 223(1).

4.12 The ultimate outcome of a native title claim is a native title determination. A determination of native title is a determination 'whether or not native title exists', and 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
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> (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
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> (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.

8 *Native Title Act 1993* (Cth) s 3(c).
9 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 70.

4.13 The High Court has emphasised repeatedly that the *Native Title Act* is the starting point for considering a determination of native title.[10] However, the interpretation of the Act has been informed by the basis upon which native title was first recognised in *Mabo [No 2]*.[11]

4.14 In *Members of the Yorta Yorta Aboriginal Community v Victoria* ('*Yorta Yorta*'), Gleeson CJ, Gummow and Hayne JJ begin their discussion of s 223 by emphasising that, upon the Crown's 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.[12] 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 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.[13]

4.15 It is thus possible to distinguish between the subject and the product of legal recognition in native title law. The *subject* of recognition is the set of Indigenous relations ordered by traditional laws and customs. The *product* of legal recognition is 'native title', a set of rights and interests enforceable within the Australian legal system.[14] The concept of recognition is considered in more detail in Chapter 2.

4.16 This basis for the recognition of native title has consequences for the construction of the definition of native title in the *Native Title Act*.[15] 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

4.17 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.[16] In *Yorta Yorta*, the High Court elaborated on how s 223(1)(a) should be construed, in particular, the significance to be attributed to the term 'traditional'.[17]

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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]–[45] (Gleeson CJ, Gummow and Hayne JJ). See Ch 2 for further discussion of the relationship of *Mabo [No 2]* to the *Native Title Act*.

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

13 Ibid [77]. See also *Akiba v Commonwealth* (2013) 250 CLR 209, [9] (French CJ, Crennan J).

14 Christos Mantziaris and David Martin, *Native Title Corporations: A Legal and Anthropological Analysis* (Federation Press, 2000) 10.

15 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [45] (Gleeson CJ, Gummow and Hayne JJ).

16 *Western Australia v Ward* (2002) 213 CLR 1, [18] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *De Rose v South Australia (No 1)* (2003) 133 FCR 325, [161].

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

'Traditional' laws and customs

4.18 Section 223(1)(a) is in the present tense, directing attention to the present possession of rights and interests.[18] However, in *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ noted that the *Native Title Act* does not create new rights and interests in land called 'native title'.[19] Instead,

> 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.[20]

4.19 The reference to 'traditional' laws and customs in the definition of native title must be understood in light of this. As a result, Gleeson CJ, Gummow and Hayne JJ construe the meaning of 'traditional' 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;[21]
- 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;[22]
- 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.[23]

4.20 From this approach to the meaning of traditional laws and customs has arisen a focus on two major issues:

- change: the extent to which laws and customs can change over time and still be considered traditional; and
- continuity: the extent of continuity of acknowledgment and observance of laws and customs over time that is required.

4.21 Both of these issues arise for consideration under the Terms of Reference for this Inquiry.

4.22 In relation to change to laws and customs, Gleeson CJ, Gummow and Hayne JJ stated that some change to, or adaptation of, traditional laws and customs was not necessarily fatal to a native title claim.[24] The key question in relation to this was

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18 Ibid [85] (Gleeson CJ, Gummow and Hayne JJ), [101] (Gaudron and Kirby JJ).
19 Ibid [45].
20 Ibid.
21 Ibid [46].
22 Ibid.
23 Ibid [47]. See also Perry and Lloyd, above n 5, 22–23.
24 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [83]. See Ch 9 for a consideration of evolution and adaptation in other jurisdictions.

whether the laws and customs can still be seen to be traditional, in the sense of having origins in pre-sovereign laws and customs.[25]

4.23 In relation to continuity, Gleeson CJ, Gummow and Hayne JJ considered that 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.[26]

4.24 The Full Federal Court has summarised this requirement as 'whether the laws and customs have continued to be acknowledged and observed substantially uninterrupted by each generation since sovereignty'.[27]

4.25 The ALRC acknowledges that traditional laws and customs are properly construed as those laws and customs that were acknowledged and observed at sovereignty. However, in Chapter 5 the ALRC recommends amendments to the definition of native title in the *Native Title Act* to:

- provide explicitly that the traditional laws and customs under which native title rights and interests are possessed may adapt, evolve or otherwise develop;[28] and
- clarify that it is not necessary to establish that the acknowledgment of traditional laws and the observance of traditional customs have continued substantially uninterrupted by each generation since sovereignty.[29]

Laws and customs

4.26 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'.[30]

4.27 In *Harrington-Smith v Western Australia (No 9)*, Lindgren J elaborated on what is required for rules to have normative content, and quoted the following passage from Professor HLA Hart:

> What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in

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25 Ibid.
26 Ibid [87].
27 *Bodney v Bennell* (2008) 167 FCR 84, [73]. See also *Risk v Northern Territory* (2007) 240 ALR 75, [78]–[98].
28 Rec 5–1.
29 Recs 5–2, 5–3.
30 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [42] (Gleeson CJ, Gummow and Hayne JJ). See also *Akiba v Queensland (No 3)* (2010) 204 FCR 1, [171]–[174].

> criticism (including self-criticism), demands for conformity, and in acknowledgments that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong'.[31]

Society

4.28 In *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ said 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.[32]

4.29 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, but may be utilised as a 'conceptual tool' to illuminate the central question of acknowledgment and observance of traditional laws and customs.[33] Nevertheless, it has been considered clear 'that *Yorta Yorta* stands for the proposition that s 223(1)(a) requires proof of the continued existence of a "society"'.[34]

4.30 In determining whether a group of people constitutes a society, the central consideration is whether the group acknowledges the same body of laws and customs relating to rights and interests in land and waters.[35] 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'.[36]

4.31 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"'.[37]

4.32 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.[38] The question of whether a particular aspect of a society has been lost or retained since sovereignty is

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31 *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, [996] quoting HLA Hart, *The Concept of Law* (Oxford University Press, 2nd ed, 1994) 57.

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

33 *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].

34 *Croft on behalf of the Barngarla Native Title Claim Group v South Australia* [2015] FCA 9 (22 January 2015) [61].

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

36 Ibid [71]. See, eg, *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003); *Alyawarr, Kaytetye, Warumungu, Wakay 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.

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

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

relevant only if that question helps determine whether the laws and customs of the present-day society are traditional.[39]

4.33 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.[40]

4.34 The question of 'society' has been described as a 'problematic and quite time consuming distraction' in native title litigation.[41] The ALRC considers that the *Native Title Act* should be amended to clarify that society is not an independent element of proof in native title.[42] Rather, it is only relevant insofar as it helps answer the central definitional question of whether rights and interests are possessed under traditional laws acknowledged, and traditional customs observed, by the native title claim group.

4.35 Related to this, the ALRC also recommends that the definition of native title be amended to make clear that native title rights and interests may be succeeded to by another Aboriginal or Torres Strait Islander group, where those rights and interests have been transmitted, transferred or otherwise acquired in accordance with traditional laws and customs.[43]

Content of native title rights and interests

4.36 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.[44]

4.37 The content of native title rights and interests is defined by traditional laws and customs. That is, native title rights and interests are those that find their origin in traditional (pre-sovereign) law and custom. This is because:

> What survived [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

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39 *Croft on behalf of the Barngarla Native Title Claim Group v South Australia* [2015] FCA 9 (22 January 2015) [640].

40 *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].

41 Paul Finn, '*Mabo* into the Future: Native Title Jurisprudence' (2012) 8 *Indigenous Law Bulletin* 5, 6.

42 Rec 5–4.

43 Rec 5–5.

44 *Western Australia v Ward* (2002) 213 CLR 1, [18] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

> to the traditional laws acknowledged and the traditional customs observed by the indigenous peoples concerned.[45]

4.38 This means that native title rights and interests 'may not, and often will not, correspond with rights and interests in land familiar to the Anglo-Australian property lawyer'.[46] It also means that, as Gummow J noted in *Wik Peoples v Queensland*, the 'content of native title, its nature and incidents, will vary from one case to another'.[47] Claimants are required to establish on the evidence the content of native title rights and interests.[48]

4.39 The High Court in *Ward* used the metaphor of native title as a 'bundle of rights' in this context, to draw attention 'first to the fact that there may be more than one right or interest and secondly to the fact that there may be several *kinds* of rights and interests in relation to land that exist under traditional law and custom'.[49]

4.40 Section 223(2) provides that such rights and interests include hunting, gathering or fishing rights and interests. However, native title rights and interests may comprise a range of other rights and interests, and may extend to possession, occupation, use and enjoyment of land or waters to the exclusion of all others.

4.41 In *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ also pointed out that the relevant statutory 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.[50]

4.42 The nature and content of native title rights and interests is considered further in Chapter 8. In that chapter, the ALRC distinguishes between a right and its exercise and recommends that it be made clear in the *Native Title Act* that native title may comprise a right that may be exercised for any purpose, including commercial or non-commercial purposes.

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

4.43 Section 223(1)(b) has been held to require that claimants demonstrate that they have a connection, by their traditional laws and customs, with the land or waters claimed. That is, the phrase 'by those laws and customs', in s 223(1)(b) is taken to refer

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45 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [37] (Gleeson CJ, Gummow and Hayne JJ).
46 Ibid [40] (Gleeson CJ, Gummow and Hayne JJ).
47 *Wik Peoples v Queensland* (1996) 187 CLR 1, 169.
48 Perry and Lloyd, above n 5, 14.
49 *Western Australia v Ward* (2002) 213 CLR 1, [95] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
50 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [84].

to the traditional laws and customs referred to in s 223(1)(a).[51] Satisfaction of s 223(1)(b), like s 223(1)(a), is a question of fact.[52]

4.44 Thus, ss 223(1)(a) and (b) are interrelated. However, the High Court in *Ward* stated that a separate inquiry from that required by s 223(1)(a) is demanded by s 223(1)(b).[53] This is so even though the inquiry may depend on the same evidence used to establish s 223(1)(a).[54]

4.45 The drafting of s 223(1)(b) has been described as 'opaque'.[55] Its origin lies 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'.[56] The Full Federal Court has given consideration to what is required for connection to be established, stating in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* ('*Alyawarr*') that:

> 'connection' is descriptive of the relationship to the land and waters which is, in effect, declared or asserted by the acknowledgment of laws and observance of customs which concern the land and waters in various ways. To observe laws and acknowledge customs which tell the stories of the land and define the rules for its protection and use in ways spiritual and material is to keep the relevant connection to the land.[57]

4.46 When traditional laws and customs confer rights and responsibilities in relation to land, that creates connection as required by s 223(1)(b).[58] The connection, or relationship, between people and country includes the obligation to care for country and the right to speak for country.[59]

Connection and continuity

4.47 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.[60] The Full Court of the Federal Court has observed that this means that connection involves

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51 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46], [86] (Gleeson CJ, Gummow and Hayne JJ); *Western Australia v Ward* (2002) 213 CLR 1, [18] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Bodney v Bennell* (2008) 167 FCR 84, [165].

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

53 *Western Australia v Ward* (2002) 213 CLR 1, [43] (Gleeson CJ, Gaudron Gummow and Hayne JJ).

54 Ibid [18].

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

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

57 Ibid [88].

58 *De Rose v South Australia (No 2)* (2005) 145 FCR 290, [113].

59 *Western Australia v Ward* (2002) 213 CLR 1, [14] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

60 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [86] (Gleeson CJ, Gummow and Hayne JJ).

an element of continuity, deriving from 'the necessary character of the relevant laws and customs as "traditional"'.[61]

4.48 Connection can be maintained by continued acknowledgment and observance of traditional laws and customs.[62] In *Bodney v Bennell*, the Full Federal Court 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.[63] In *Sampi v Western Australia*, French J expressed the continuity aspect of the connection inquiry as involving the 'continuing internal and external assertion by [a claimant community] of its traditional relationship to the country defined by its laws and customs'.[64]

4.49 As noted above, and as set out in Chapter 5, the ALRC recommends that the Act clarify that it is not necessary to establish that acknowledgment and observance of traditional laws and customs has continued substantially uninterrupted by each generation since sovereignty.[65] The ALRC considers that it follows from this recommendation that a commensurate approach should be taken to establishing connection for the purpose of satisfying s 223(1)(b).

Establishing connection

4.50 Evidence that connection with land is a 'continuing reality' to the claimants must be produced to establish connection:

> the connection inquiry 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.[66]

4.51 Evidence of presence on the land and the exercise of rights in relation to the land amounts to evidence of the maintenance of connection with land.[67] However, lack of physical presence does not necessarily mean a loss of connection.[68] The ALRC was asked whether there should be 'confirmation that "connection with the land and waters" does not require physical occupation or continued or recent use'. The ALRC has concluded that such confirmation is unnecessary as the law in this area is clear. The

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61 *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].

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

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

64 *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].

65 Recs 5–2, 5–3.

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

67 *Western Australia v Ward* (2000) 99 FCR 316, [243] (Beaumont and von Doussa JJ).

68 *Bodney v Bennell* (2008) 167 FCR 84, [172].

significance of physical occupation, or continued and recent use, is discussed further in Chapter 6.

4.52 Other ways of demonstrating observance of law and custom in relation to land and waters, and thus connection, can be found in knowledge of ceremony, song, dance and body painting[69] and knowledge of the land and the Dreamtime beings that created the land.[70] For example, in *Western Australia v Ward*, the Full Federal Court stated that:

> Acknowledgment and observance may be established by evidence that traditional practices and ceremonies are maintained by the community, insofar as that is possible, off the land, and that ritual knowledge including knowledge of the Dreamings which underlie the traditional laws and customs, continue to be maintained and passed down from generation to generation. Evidence of present members of the community, which demonstrates knowledge of the boundaries to their traditional lands, in itself provides evidence of continuing connection through adherence to their traditional laws and customs.[71]

4.53 The *Federal Court Rules 2011* (Cth) make specific provision for the giving of evidence by way of singing, dancing and storytelling.[72]

4.54 Using language is a way of observing law and custom, and may connect people with country.[73] Language is sometimes said to have been 'deposited in the landscape by Dreamtime figures', and it becomes 'possessed by the Aboriginal people connected with the land'.[74]

4.55 The connection inquiry can have a particular topographic focus within the claim area, but connection to an area may be inferred from the evidence as a whole and from evidence of connection to surrounding or neighbouring areas.[75] 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.[76]

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69 Grace Koch, 'We Have the Song, So We Have the Land: Song and Ceremony as Proof of Ownership in Aboriginal and Torres Strait Islander Land Claims' (AIATSIS Research Discussion Paper 33, AIATSIS, July 2013) 8–10.

70 Graeme Neate, '"Speaking for Country" and Speaking About Country: Some Issues in the Resolution of Indigenous Land Claims in Australia' (Paper presented at Joint Study Institute, Sydney, 21 February 2004) 65–68.

71 *Western Australia v Ward* (2000) 99 FCR 316, [243] (Beaumont and von Doussa JJ).

72 *Federal Court Rules 2011* (Cth) r 34.123. See, eg, *Akiba v Queensland (No 3)* (2010) 204 FCR 1, [317]; *Hughes (on behalf of the Eastern Guruma People) v Western Australia* [2007] FCA 365 (1 March 2007) [11]; *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory* (2004) 207 ALR 539, [24].

73 Koch, above n 69, 38; *Ward v Western Australia* (1998) 159 ALR 483.

74 *Ward v Western Australia* (1998) 159 ALR 483, 525.

75 *Bodney v Bennell* (2008) 167 FCR 84, [175]; *Moses v Western Australia* (2007) 160 FCR 148, [312].

76 *Bodney v Bennell* (2008) 167 FCR 84, [179].

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

4.56 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.[77] The concept of recognition is considered in detail in Chapter 2.

4.57 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.[78]

4.58 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'.[79] If there is no inconsistency, the common law will 'recognise' the rights and interests by giving remedies in support of the relevant rights and interests to those who hold them.[80] If there is inconsistency, recognition by the common law will be 'withdrawn'.[81]

4.59 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',[82] or 'clash with the general objective of the common law of the preservation and protection of society as a whole'.[83]

4.60 Recognition may also cease because native title rights and interests have been 'extinguished'.[84] 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.[85]

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77 *Western Australia v Ward* (2002) 213 CLR 1, [20] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

78 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [77] (Gleeson CJ, Gummow and Hayne JJ).

79 *Commonwealth v Yarmirr* (2001) 208 CLR 1, [76] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

80 Ibid [42]; *Akiba v Commonwealth* (2013) 250 CLR 209, [9] (French CJ, Crennan J).

81 *Western Australia v Ward* (2002) 213 CLR 1, [82] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

82 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [77] (Gleeson CJ, Gummow and Hayne JJ).

83 *Western Australia v Ward* (2002) 213 CLR 1, [21] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

84 Ibid [21]. For example, in *Fejo*, it was decided that native title was 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] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

85 *Western Australia v Ward* (2002) 213 CLR 1, [26], [78] (Gleeson CJ, Gaudron Gummow and Hayne JJ); *Western Australia v Brown* (2014) 306 ALR 168, [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.

4.61 Extinguishment is, in this sense, the 'obverse' of recognition.[86] 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'.[87] 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.[88]

4.62 Questions of continuity of acknowledgment and observance of traditional laws and customs,[89] or of a traditional community,[90] pertain to s 223(1)(a), and not s 223(1)(c).[91]

Reforming the requirements for establishing native title

4.63 The following four chapters consider in detail the requirements for establishing native title rights and interests, and develop the ALRC's case for reform of the *Native Title Act*. Chapter 5 makes a number of recommendations for reform to the definition of native title. Chapter 6 considers the concept of 'connection' with land and waters. Chapter 7 considers how native title is proved, and recommends that there be guidance in the *Native Title Act* regarding when inferences can be drawn in proof of native title. Chapter 8 considers the nature and content of native title rights and interests, and recommends that it be made clear in the Act that native title may comprise a right that may be exercised for any purpose, including commercial or non-commercial purposes.

86 *Akiba v Commonwealth* (2013) 250 CLR 209, [10] (French CJ, Crennan J).
87 Ibid [10]. See also *Western Australia v Ward* (2002) 213 CLR 1, [21] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
88 *Congoo on behalf of the Bar-Barrum People No 4 v Queensland* (2014) 218 FCR 358, [35] (North and Jagot JJ).
89 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [92] (Gleeson CJ, Gummow, Hayne JJ).
90 Ibid [111] (Gaudron and Kirby JJ).
91 Ibid [92] (Gleeson CJ, Gummow and Hayne JJ).