

LAW IN THE PRESENT TENSE: TRADITION AND CULTURAL CONTINUITY IN *MEMBERS OF THE YORTA YORTA ABORIGINAL COMMUNITY V VICTORIA*

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[In the 12 years since native title was first recognised in Australia, 32 determinations, of a total of 49, have pronounced native title to be extinguished over at least part of the area claimed (as of 25 March 2004). This has been as a result of either government acts that are inconsistent with native title rights, or because the contemporary existence of traditional law could not be proved. The Yorta Yorta case, in many ways a test case for native title rights in south-eastern Australia, considered the second manner of extinguishment. This article critically assesses the Federal and High Court decisions, and argues that the courts have applied a notion of tradition and cultural continuity that is unnecessarily narrow, denying recognition of the rights of Aboriginal people who, in spite of colonisation, see their law as existing in the present tense.]

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The Yorta Yorta people see native title as a celebration of our survival. ... [O]ur people always knew our history. What happens in the native title process, unfortunately, is that our history, as we know it, has to be validated.¹

The deck is stacked against the native-title holders whose fragile rights must give way to the superior rights of the landholders whenever the two classes of rights conflict.²

I INTRODUCTION

On 12 December 2002, a majority of the High Court dismissed the Yorta Yorta community's appeal from a decision of the Full Court of the Federal Court which held that native title did not exist in the claimed area.³ The claim to native title had been rejected by Olney J at first instance in the Federal Court⁴ and by a majority of two judges in the Full Federal Court.⁵ The words of McHugh J in *Ward* (cited above) intimate, perhaps unintentionally, a degree of underhandedness in native title, because in card-playing terminology, 'stacking the deck' is in fact cheating. While McHugh J's comment was specifically levelled at the rules governing extinguishment by government act, similar intimations can be made regarding the principles applied to the claimants in the Yorta Yorta case,⁶ which was concerned with extinguishment as a result of a failure to prove the contemporary existence of traditional law.

Native title was first declared by the High Court in *Mabo v Queensland [No 2]*⁷ as the recognition of the traditional rights and interests held by indigenous peoples of Australia under their customary law. The *Native Title Act 1993* (Cth) ('NTA') adopted the basic terms of this common law recognition.⁸ The Yorta Yorta community brought the first claim of native title after the *NTA* came into force. Extending over various parcels of public land amongst the farming land and towns along the Murray River in New South Wales and Victoria, the claim was always going to be a test case of the applicability of native title to more heavily 'settled' areas in the south and east of Australia. The key issue was whether Aboriginal people who have suffered dislocation, and

¹ Monica Morgan, 'Women and Native Title' in Lisa Strelein and Kado Muir (eds), *Native Title in Perspective: Selected Papers from the Native Title Research Unit 1998–2000* (2000) 23, 23–5.

² *Western Australia v Ward* (2002) 191 ALR 1, 156 (McHugh J) ('*Ward*').

³ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 ('*Yorta Yorta (High Court)*').

⁴ *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 (Unreported, Olney J, 8 August 1998) ('*Yorta Yorta (Federal Court)*').

⁵ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 180 ALR 655 (Black CJ, Branson and Katz JJ) ('*Yorta Yorta (Full Federal Court)*').

⁶ The phrase 'Yorta Yorta case' is used throughout this article to refer generically to all three of the Federal Court, Full Federal Court and High Court decisions.

⁷ (1992) 175 CLR 1 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) ('*Mabo*').

⁸ One of the objects of the *NTA*, set out in s 3(a), is 'to provide for the recognition and protection of native title'; the definition of native title in s 223 'is plainly based on what was said by Brennan J in *Mabo [No 2]*': *Ward* (2002) 191 ALR 1, 16 (Gleeson CJ, Gaudron, Gummow and Hayne JJ); see below Part III(B). See below Part VI for further discussion of the relationship between the *NTA* and the common law in defining native title.

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whose cultural practices have undergone significant changes, could establish a right to native title under the terms of the *NTA*. How would the court translate the specification in s 223 of the *NTA* that native title rights and interests are those possessed under traditional laws acknowledged by the people?

The concept of ‘recognition’ that is the kernel of native title necessarily implicates a hermeneutic strategy, which finds its expression in the way in which interpretations and translations take place between different legal cultures in order to identify what is to be given the protection of state-sponsored remedies through that recognition. In *Mabo*, Brennan J admitted that the recognition of native title as a *property right* was a means to an end: ‘[i]f it be necessary to categorise an interest in land as proprietary in order that it survive a change in sovereignty, the interest possessed by a community that is in exclusive possession of land falls into that category.’⁹ The end, as was made clear in *Mabo*, was to achieve a measure of justice for indigenous Australians by moving beyond the racist colonial attitudes that judged other peoples according to European standards (based on specific ideas of government, ownership, use of land, and of ‘civilisation’ in general) and by protecting a *sui generis* right — native title — that attempted to match, as much as could be possible within the property paradigm, indigenous ideas of their relationship to land.

The recognition of native title through the legal system will inherently involve translations at all stages of the process. For example, how will indigenous practices and beliefs be described as proprietary rights and interests that will be protected? How will those who possess the rights and interests be identified? What does it mean to acknowledge a traditional law, and what makes something traditional? These are terms — needless to say, all English words entailing Western concepts — that require consideration under the definition of native title in s 223 of the *NTA*. It would be a mistake, however, to take those terms, the means to recognition, as ends in themselves. This happens when consideration of the terms, such as ‘rights and interests’, or ‘tradition’, is undertaken in isolation from their relations to the broader concepts underlying recognition — namely, the attempt by the Australian common law to recognise that an entire system of relating to land has survived colonisation. Rights and interests are a manifestation of the larger picture that should remain at the heart of native title — the Dreaming law that, for indigenous peoples all around Australia, will always exist in the present tense.¹⁰

In this article, I first outline the background of the case and the reasons for judgment in the first instance decision, the Full Federal Court appeal and the High Court appeal. I then consider in some detail the way in which the test for

⁹ *Mabo* (1992) 175 CLR 1, 51. Even this statement presumes ‘exclusive possession’ to be the determinative characteristic.

¹⁰ The Dreaming is a central force in Aboriginal culture and has been described as creation story, sovereign authority, and source of all law. Temporally, it is the distant past as well as eternal and present — the ‘everywhen’. See Deborah Rose, *Nourishing Terrains: Australian Aboriginal Views on Landscape and Wilderness* (1996) 26–8, 35–44; Christine Morris, ‘Constitutional Dreaming’ in Charles Sampford and Tom Round (eds), *Beyond the Republic: Meeting the Global Challenges to Constitutionalism* (2001) 290; Peter Sutton, *Native Title in Australia: An Ethnographic Perspective* (2003) 117–18; W E H Stanner, ‘The Dreaming’ in W H Edwards (ed), *Traditional Aboriginal Society: A Reader* (1997) 227.

the ‘survival’ of native title rights and interests, often couched in terms of a test of ‘cultural continuity’, has developed throughout this case. My particular focus will be on the manner in which the High Court majority has used ideas from legal theory scholarship to tie the existence of rights and interests to a specific concept of a normative society. I suggest that while the majority appears to have given some thought to the derivation of native title rights and interests in an indigenous society’s underlying normative system, which, as I have just indicated, ought to happen, there is no real attempt to understand this system from the perspective of indigenous peoples. Further, I argue that the majority has not seen the implications of this approach for the trial judge’s treatment of the evidence on which the decision depended. The result is an emphasis on the past that downplays the survival of Koori¹¹ culture in the face of colonisation, and that, in itself, exercises a colonising force.

By contrast, I argue that because the minority decisions in both appeals have their focus on the present tense — on the current Yorta Yorta community and the way in which its contemporary practices can be seen to have evolved from a traditional set of principles — they have captured more accurately the post-colonial motives that originally drove the recognition of indigenous rights to land.

II FACTS OF THE CASE

The claim was lodged on 22 February 1994 over parcels of land totalling approximately 2000 square kilometres in a 20 000 square kilometre area in northern Victoria and southern New South Wales. The compulsory mediation¹² that followed laboured with over 400 government agencies, graziers, loggers and bushwalkers contesting the claim. In the midst of a native title backlash, swelled by politicians’ suggestions that backyards were under threat,¹³ the non-claimant parties seemed to fear the implications of recognition of native title in the area — for example, that land would be ‘locked up’ from use by non-indigenous people — and were resistant to the claim.¹⁴ In May 1995, the claim was referred to the Federal Court after the Native Title Tribunal mediator, Gray J, concluded that agreement would not be reached.

In submissions before the trial judge, Olney J, counsel for the claimants told the Court that the claimants’ forebears were traditional owners of the claimed area who had been forced to leave their lands, were often subjected to brutal treatment at the hands of white people, and who, in the Aboriginal missions, had

¹¹ The term used locally by indigenous people of south-eastern Australia to identify themselves.

¹² *NTA s 86B(1)*.

¹³ See, eg, Michael Gordon, ‘Backyard Offensive as Wik Gets Nasty’, *The Australian* (Sydney), 28 November 1997, 1.

¹⁴ See Australian Institute of Aboriginal and Torres Strait Islander Studies Research Unit, ‘Claims: Yorta Yorta’ [1996] 6 *Native Title Newsletter* 6 <<http://www.aiatsis.gov.au/rsrch/ntru/newlet/ntru6-96.pdf>>; Michael Gordon, ‘Testing Times for the Yorta Yorta’, *The Age* (Melbourne), 23 May 2002, 13; Wayne Atkinson, ‘“Not One Iota” of Land Justice: Reflections on the Yorta Yorta Native Title Claim 1994–2001’ (2001) 5(6) *Indigenous Law Bulletin* 19; Wayne Atkinson, ‘Mediating the Mindset of Opposition: The Yorta Yorta Case’ (2002) 5(15) *Indigenous Law Bulletin* 8.

been sanctioned for ‘immoral’ behaviour and failing to attend white functions such as church services. White settlement of the claim area had begun in the 1830s and increased rapidly as squatters, and then other settlers, moved into the Murray-Goulburn valley. Early estimates put the local indigenous population in the thousands; by one account this was down to 482 by the 1890s.¹⁵ At the time of the proceedings, it was asserted that there were approximately 4500 ‘applicants’ involved in the Yorta Yorta community’s claim.¹⁶

III *YORTA YORTA* (FEDERAL COURT)

The claim made by the Yorta Yorta community at the hearing was framed in the following terms: community members had inherited native title rights to the area from their ancestors, and had enjoyed those rights through the generations, first by maintaining continuing, uninterrupted occupation in the majority of the claim area, and (even where that had not been the case) by maintaining a traditional connection with the area. It was argued that the community members had maintained a system of customs and practices inherited from their ancestors ‘*in adapted form*’, which ‘*in its essential features*’ was continuous with the system of custom and tradition existing in 1788.¹⁷

Based on the definition in s 223 of the *NTA*, and supplemented by principles from *Mabo*,¹⁸ Olney J held that native title required: first, proof ‘that the members of the claimant group ... are descendants of the indigenous people who occupied ... the claimed area prior to the assertion of Crown sovereignty’;¹⁹ second, establishment of ‘the nature and content of the traditional laws acknowledged, and the traditional customs observed by the indigenous people, in relation to their traditional land’;²⁰ third, proof ‘that the traditional connection with the land of the ancestors of the claimant group has been substantially maintained since the time sovereignty was asserted’;²¹ and lastly, proof that ‘the claimed rights and interests must be rights and interests recognised by the common law of Australia.’²²

A *The Evidence*

Owing to its importance in my discussion of tradition and cultural continuity, and to the general themes of recognition, translation and colonisation that inform that discussion, I will give a brief explanation of the nature of the evidence in this case, and its treatment by the trial judge.

¹⁵ *Yorta Yorta (Federal Court)* [1998] FCA 1606 (Unreported, Olney J, 18 December 1998) [72].

¹⁶ *Ibid* [50], citing the opening address of counsel for the applicants. In the final claim, eight named applicants became registered as native title claimants on behalf of the Yorta Yorta community: at [6].

¹⁷ *Yorta Yorta (High Court)* (2002) 194 ALR 538, 545–6 (emphasis in original).

¹⁸ (1992) 175 CLR 1.

¹⁹ *Yorta Yorta (Federal Court)* [1998] FCA 1606 (Unreported, Olney J, 18 December 1998) [4].

²⁰ *Ibid*.

²¹ *Ibid*.

²² *Ibid*.

During the trial, Olney J heard evidence from 201 witnesses, including 54 Yorta Yorta community members, two anthropologists, an archaeologist and a linguist. The claimants had also submitted some written historical accounts to supplement oral and anthropological evidence about the earlier occupation and customs of their ancestors. Included were two works by Edward Curr,²³ an early European pioneer in the region in the 1840s and 1850s. His writings are in the nature of a memoir and contain his (untrained) observations of the Aboriginal peoples living on his pastoral run. It was a move that backfired on the claimants, as Curr's account of Aboriginal culture was used by Olney J to compare unfavourably with oral accounts by community members and to document the discontinuity of their culture.

In the result, his Honour found that the Yorta Yorta community's claim failed because the claimants had not shown that they had

occupied the land in the relevant sense since 1788, nor ... continued to observe and acknowledge, throughout that period, the traditional laws and customs in relation to the land of their forebears. ... The tide of history has indeed washed away any real acknowledgment of their traditional laws.²⁴

Various extracts from Curr's *Recollections of Squatting in Victoria, Then Called Port Phillip District* — describing territorial, hunting, initiation and other practices — are included in the reasons for judgment as having 'some bearing upon the traditional laws and customs of the ancestors of the claimant group'²⁵ in the 1840s. The following extracts, cited in Olney J's judgment, serve as examples.

On rights to land:

I recollect, on one occasion, a certain portion of country being pointed out to me as belonging exclusively to a boy who formed one of the party with which I was out hunting at the time. ... I not only complimented the proprietor on his estate, *on which my sheep were daily feeding*, but, as I was always prone to fall in with the views of my sable neighbours when possible, I offered him on the spot, with the most serious face, a stick of tobacco for the fee-simple of his patrimonial property, which, after a short consultation with his elders, was accepted and paid.²⁶

On food:

as they never sowed nor reaped, so they never abstained from eating the whole of any food they had got with a view to the wants of the morrow. If anything was left for Tuesday, it was merely that they had been unable to consume it on the Monday. In this they were like the beasts of the forest. To-day they would feast — aye, gorge — no matter about the morrow. So, also, they never spared a young animal with a view to its growing bigger.²⁷

²³ Edward Curr, *Recollections of Squatting in Victoria, Then Called Port Phillip District* (1883) ('*Recollections*'); Edward Curr, *The Australian Race: Its Origin, Languages, Customs, Place of Landing in Australia, and the Routes by which It Spread Itself over That Continent* (1886).

²⁴ *Yorta Yorta (Federal Court)* [1998] FCA 1606 (Unreported, Olney J, 18 December 1998) [129].

²⁵ *Ibid* [117].

²⁶ *Ibid* [111] (emphasis in original).

²⁷ *Ibid* [115].

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On burial practices:

The dead were rolled up on their opossum-rugs, the knees being drawn up to the neck with strings, when the corpse was interred in a sitting posture, or on its side, generally in a sand-hill, in which a grave about four feet deep had been excavated. A sheet of bark was then placed over the corpse, the sand filled in, and a pile of logs about seven feet long and two feet high was raised over all. Round about the tomb it was usual to make a path, and not unfrequently a spear, surmounted by a plume of emu feathers, stuck at the head of the mound, marked the spot where rested the remains of the departed. Women were interred with less ceremony.²⁸

Following this, Olney J discussed evidence from the time of Daniel Matthews (another pastoralist) in the 1860s, which shows further dislocation of Aboriginal peoples and their suffering due to disease, but is ‘silent concerning the continued observance ... of those aspects of traditional lifestyle’ referred to by Curr.²⁹ Olney J suggested that this absence of *evidence* about continuing practices is in itself evidence of their *absence*. His Honour supported this with a petition in 1881 by which 42 Aborigines claimed lands to support themselves, raising the inference that they had already been dispossessed and wished to give up their old ways of life in order to settle down to ‘more orderly habits of industry.’³⁰

Lastly, Olney J considered the claimants’ evidence of their current cultural practices. Evidence of hunting and fishing according to the traditional value of immediate consumption, concern to protect timber and water resources, respect for functional sites such as middens or scarred trees used to make canoes, and the reburial of remains returned from museums are said by Olney J to be worthy objectives, but ‘cannot be regarded as matters relating to the observance of traditional laws and customs’ as observed by Curr.³¹ In the absence of a ‘continuous link back to the laws and customs of the original inhabitants’ of the area, these current practices could not constitute traditional laws or customs as required by the *NTA*.³²

The decision and its approach to the evidence have been extensively critiqued by other writers,³³ and I will not repeat their analyses here. I will, however, briefly mention some of the grounds of criticism that frame my later discussion.

²⁸ Ibid [116].

²⁹ Ibid [118].

³⁰ Ibid [120].

³¹ Ibid [125].

³² Ibid [128].

³³ See Valerie Kerruish and Colin Perrin, ‘Awash in Colonialism: A Critical Analysis of the Federal Court Decision in the Matter of *The Members of the Yorta Yorta Aboriginal Community v Victoria*’ (1999) 24 *Alternative Law Journal* 3; Roderic Pitty, ‘A Poverty of Evidence: Abusing Law and History in *Yorta Yorta v Victoria* (1998)’ (1999) 5 *Australian Journal of Legal History* 41; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 1999* (2000); Alexander Reilly, ‘The Ghost of Truganini: Use of Historical Evidence as Proof of Native Title’ (2000) 28 *Federal Law Review* 453; Simon Young, ‘The Trouble with “Tradition”: Native Title and the Yorta Yorta Decision’ (2001) 30 *University of Western Australia Law Review* 28; David Ritter, ‘The Weltgericht of *Yorta Yorta*’ (Paper presented at the Past and Future of Land Rights and Native Title Conference, Townsville, 28–30 August 2001); Clare Land, ‘Representations of Gender in E M Curr’s “Recollections of Squatting in Victoria”: Implications for Land Justice through the Native

The main concerns regarding Olney J's judgment have related to his treatment of oral evidence, his reading of historical documents, his understanding of 'tradition' and 'cultural continuity', and the perpetuation of colonisation arising from his use of such concepts as 'the tide of history'³⁴ that is said to have washed away the rights of indigenous peoples. For example, there is no attempt to contextualise Curr's writings, written around thirty years after Curr lived in the region and aimed at entertaining 'a British readership avid for exotic news of their far-flung empire' with reminiscences of his youthful exploits.³⁵ There is no doubt that the 'traditional culture' in question may have been creatively embellished, misremembered, misconstrued or simply unobserved by Curr.³⁶ As Alexander Reilly points out:

By their nature, historical accounts tend to overstate the impact of the extinction of Aboriginality because they present only the colonial history of Aboriginal life ... They report only selected events considered worthy of record. They emphasise not the daily practices of Aboriginal inhabitants, but more dramatic events, such as difficulties in the relationship between settlers and Aboriginal people ... These events form a chronology and become reified as the official story of the region.³⁷

The lack of contextualisation also applies to the use of the 1881 petition. Olney J read it literally — the people wish to give up their traditional ways — instead of interpreting it as a strategy of resistance against colonisation demonstrating a desire by the Yorta Yorta community's ancestors to maintain the connection to their traditional lands.

Curr's language in the two texts in evidence is replete with examples of his infantilisation of the local people — they are 'children of the woods'³⁸ and his 'sooty friends'³⁹ — and both his books used in evidence contain 'graphic accounts of indigenous practices which captivated the settler imaginary — perceived instances of rape, forced female child marriage, initiatory bodily mutilation, retaliatory spearings and beatings'.⁴⁰ Between the lines is Curr's own role in what he saw as the inevitable end of Aboriginal culture:

Title Process' (2002) 5 *Indigenous Law Bulletin* 6; Atkinson, "'Not One Iota" of Land Justice', above n 14.

³⁴ Olney J borrowed this phrase from the judgment of Brennan J in *Mabo* (1992) 175 CLR 1, 60.

³⁵ Patricia Grimshaw and Andrew May, "'Inducements to the Strong to Be Cruel to the Weak": Authoritative White Colonial Male Voices and the Construction of Gender in Koori Society' in Ailsa Burns and Norma Grieve (eds), *Australian Women: Contemporary Feminist Thought* (1994) 92, 95.

³⁶ Olney J himself discounts part of Curr's work as being 'either based on incomplete information or simply wrong' where it conflicts with other sources: *Yorta Yorta (Federal Court)* [1998] FCA 1606 (Unreported, Olney J, 18 December 1998) [54].

³⁷ Reilly, 'The Ghost of Truganini', above n 33, 465.

³⁸ Curr, *Recollections*, above n 23, 87.

³⁹ *Ibid* 179.

⁴⁰ Elizabeth Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (2002) 167.

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But our civilisation has rolled over thee, my Enbena, somewhat rudely since those times; ending alike, for the most part, thy merry ways and thy rascalities. Of thy tribe scarce one is left. Forest and swamp know thee no more. Adieu!⁴¹

In addition, the assumptions of patriarchy in the observations of Curr — that women held a subservient position in traditional Aboriginal society — led to an impoverished view of Yorta Yorta culture, since accounts of women’s sites, practices, work and political agency are absent from his writings.⁴² Not only were these observations unable to be corroborated, nor their veracity tested in cross-examination, but the historical texts were themselves held up as a yardstick against which the oral accounts of history and culture given by the members of the Yorta Yorta community should be measured.

Most aggrieved, however, were the Yorta Yorta peoples themselves, some of whom felt they were being declared ‘not sufficiently Aboriginal’ in spite of their own sense of identity and community.⁴³ Yorta Yorta claimant Dr Wayne Atkinson comments that native title claimants are required to ‘fall outside history’ in order to succeed.⁴⁴

B *Tradition and ‘The Tide of History’*

Olney J’s focus on continuity of culture was drawn from the use of the word ‘traditional’ in the definition of native title rights and interests in s 223(1) of the *NTA*:

The expression native title ... 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.

The question of what denotes a law or custom as ‘traditional’ occupied much of Olney J’s attention, as it did the later judgments on appeal, in determining what degree of adaptation of traditional law and custom is permitted. Brennan J had held in *Mabo* that traditional laws and customs did not have to be ‘frozen’ in time,⁴⁵ and subsequent cases had held that traditional rights may be exercised in a modern manner — for example, by the use of guns or motorised boats.⁴⁶ However, a counterpoint was provided by Olney J’s assertion that native title

⁴¹ Curr, *Recollections*, above n 23, 436. Although this passage comes from *Recollections* and was in evidence, it does not appear in the judgment.

⁴² See Land, above n 33.

⁴³ See, eg, Morgan, above n 1, 24–5.

⁴⁴ Atkinson, “‘Not One Iota’ of Land Justice”, above n 14, 21.

⁴⁵ *Mabo* (1992) 175 CLR 1, 110.

⁴⁶ *Yanner v Eaton* (1999) 166 ALR 258, 277 (Gummow J).

rights would cease ‘when the tide of history has washed away any real acknowledgment of traditional law.’⁴⁷ As will be discussed, while the *NTA* deals with native title as a right originally recognised by the common law, the High Court majority held that it is now the *NTA* that defines the criteria for determinations of native title. Consequently, Brennan J’s judgment is no longer the source of the definitive elements of native title. The image of the ‘tide of history’ is a powerful one, however; it is explicitly invoked by Olney J in his reasons for judgment,⁴⁸ and arguably pervades later judgments through the judges’ understandings of history and culture.

The use of this image in a principle governing the extinguishment of native title raises a number of concerns. The basic doctrinal question posed by Brennan J raises difficulties on its own — when, as a practical matter, is the acknowledgment of traditional law to be deemed no longer ‘real’? This is a significantly different epistemological task from that of resolving the usual indeterminacy confronting judges in deciding what is, for example, reasonable conduct, for it involves one system evaluating the internal workings of another. Ready translations of meanings and practices cannot be made.

More profound criticisms of the ‘tide of history’ are raised by Valerie Kerruish and Colin Perrin. They argue that the concept of the ‘tide of history’ presents colonisation as an inevitable force that absolves the present law from any responsibility — it maintains a norm of extinguishment over one of recognition, and implies a ‘benchmark of authenticity’ for Aboriginal culture, one that is to be judged by the colonial legal system.⁴⁹ David Ritter also argues that the ‘tide of history’ doctrine invokes a view of history as a judge of people and events: it is an innately self-justificatory metaphor that views colonisation not ‘as traumatic historical rupture ... [but] as a continuation of the inexorable ascendancy of the forces of Western modernity.’⁵⁰ The later courts seem as oblivious as Olney J to their own hand in this contemporary chapter of the ‘tide of history’.

IV *YORTA YORTA* (FULL FEDERAL COURT)

The claimants appealed the decision, arguing that Olney J’s approach to establishing rights under traditional law required Yorta Yorta culture to be ‘frozen in time’. In attempting to create an account of Yorta Yorta culture prior to the arrival of Europeans as a starting point to which his Honour then compared current beliefs and practices, they claimed that Olney J overemphasised differences with their contemporary way of life and failed to allow for the ability of traditional laws and customs to evolve over time. Part of this failure, they argued, was due to the insufficient weight given by Olney J to the claimants’ oral evidence of the continuation of traditional laws and customs.⁵¹

⁴⁷ *Yorta Yorta (Federal Court)* [1998] FCA 1606 (Unreported, Olney J, 18 December 1998) [3].

⁴⁸ His Honour identifies this as a reason for judgment on four occasions: *Yorta Yorta (Federal Court)* [1998] FCA 1606 (Unreported, Olney J, 18 December 1998) [3], [19], [126], [129].

⁴⁹ Kerruish and Perrin, above n 33, 4.

⁵⁰ Ritter, above n 33, 7.

⁵¹ *Yorta Yorta (Full Federal Court)* (2001) 180 ALR 655, 659–60 (Black CJ).

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The majority in the Full Federal Court, Branson and Katz JJ, dismissed the appeal. While accepting that the ‘frozen in time’ approach was incorrect, the majority held that the evidence before Olney J was more than sufficient to support a finding that, at some point between the beginning of colonisation and the date of the native title claim, the community had ‘lost its character as a traditional community.’⁵² The majority held that the overall burden of proof to show that native title rights and interests had survived, which remained with the applicants, had not been discharged.⁵³

Black CJ, in dissent, also concluded that the ‘frozen in time’ approach had neither been argued nor adopted in the case at first instance; a mere ambiguity in the test applied was not strong enough to constitute an error of law.⁵⁴ However, his Honour held that Olney J had relied too heavily on historical accounts by non-Aboriginal people to document the nature of traditional culture or its lapse without sufficiently acknowledging the limitations of these sources.⁵⁵

Due to the significance of the outcome of this case for the claimants — namely, that it would permanently extinguish their native title rights — Black CJ thought it was a case in which the trial judge’s findings of fact ought to be able to be reviewed. His Honour would have allowed the appeal and remitted the matter for further hearing.

V *YORTA YORTA* (HIGH COURT)

On appeal to the High Court, the claimants shifted their argument — they claimed that both Olney J and the Full Federal Court had essentially required them to provide positive proof of continuous acknowledgement of traditional law, and that this was not mandated by the *NTA*. While they had originally claimed that the laws they had inherited from their ancestors were continuous with the system in 1788 in its essential features, their High Court submissions focused on the requirement of s 223(1) of the *NTA* that rights and interests be held under traditional laws *presently* acknowledged, and that there be a *present* connection to the land, rather than occupation of the land as a traditional Aboriginal society. It was thus not fatal to their claim if there had been a break in the acknowledgment of the laws, or if the laws were seen as being ‘revived’ rather than continuously observed. Consequently, they argued, in finding that an abandonment of tradition at some point in the past was conclusive as to the extinguishment of native title, both Olney J and the majority of the Full Federal Court had made an error of law.⁵⁶

⁵² Ibid 701 (Branson and Katz JJ).

⁵³ Ibid 693–5, 701, 703–4.

⁵⁴ Ibid 674.

⁵⁵ Ibid 675; see below Part VII(C) for further discussion of the special nature of evidence in native title cases.

⁵⁶ *Yorta Yorta (High Court)* (2002) 194 ALR 538, 548.

The High Court majority dismissed the appeal,⁵⁷ with Gaudron and Kirby JJ in dissent. Their decisions and the test applied to the Yorta Yorta community's claim are discussed below.

VI DEVELOPING A TEST FOR THE EXISTENCE OF NATIVE TITLE RIGHTS AND INTERESTS

A 'Tradition' and 'Cultural Continuity'

At a superficial glance, it might appear as if all the judges in the Yorta Yorta case accepted Brennan J's two principles as basic parameters for the continuity of culture test: (i) traditional laws and culture may adapt over time, but (ii) there will be a stage when change is no longer merely adaptation, but actually causes a break with the past. It might therefore seem as though the outcome of the trial hinged merely on a factual assessment of whether the changes in the observance of traditional law were adaptations of a continuing system of law, as the claimants initially argued, or a complete abandonment of laws and customs, as Olney J concluded. Assessing cultural continuity may then involve, in the words of the High Court minority, 'difficult questions of fact and degree.'⁵⁸

Closer analysis, however, reveals more subtle differences in the tests applied by the majority and minority, such that the outcome did not merely hinge on a finding of fact. The High Court majority disagreed with the lower courts' use of common law decisions to flesh out the definition of native title, but gave a particular reading to s 223 of the *NTA* that tightly characterised tradition as the continuity of a socio-legal system within which the same laws and customs have been practiced from the time of sovereignty. The outcome, the majority concluded, is that Olney J's findings of fact would support the same result under this test. As to the criticisms of Olney J's use of the evidence, an assessment of the reliability of evidence was held to be a matter for the primary judge.⁵⁹ Conversely, the High Court minority, on its understanding of tradition and its relation to culture, indicated that Olney J's test for the survival of native title rights and interests had led him to focus on less relevant issues, such as the maintenance of specific practices, to the prejudice of the Yorta Yorta community's claim. I now turn to a closer examination of how this test has been developed throughout the case.

1 *The Test at First Instance*

Olney J did not directly specify the test applied in relation to tradition and continuity. His Honour did quote Brennan J, however, to say that the claimants' traditional connection to the land had to be 'substantially maintained.'⁶⁰ Gaudron and Kirby JJ in the High Court pointed out that this requirement does not feature in the *NTA*, and that it is only the laws and customs giving rise to the connection

⁵⁷ Gleeson CJ, Gummow and Hayne JJ delivered a joint judgment, with McHugh J and Callinan J delivering separate judgments.

⁵⁸ *Yorta Yorta (High Court)* (2002) 194 ALR 538, 561 (Gleeson CJ, Gummow and Hayne JJ).

⁵⁹ *Ibid* 557 (Gleeson CJ, Gummow and Hayne JJ).

⁶⁰ *Yorta Yorta (Federal Court)* [1998] FCA 1606 (Unreported, Olney J, 18 December 1998) [4].

to land that must be traditional.⁶¹ In any case, it appears that in Olney J's judgment, 'continuity' is the key issue. However, the criteria for proof of continuity are never spelt out: the comparison of current practices and beliefs with those documented by pastoralists seems to speak for itself in showing a lack of continuity and in showing 'that the tide of history has indeed washed away any real acknowledgment of ... traditional laws' of indigenous people.⁶²

2 *The Test in the Full Federal Court*

As a preliminary question of statutory interpretation, Branson and Katz JJ in the Full Federal Court held that the requirement in s 223(1)(c) of the *NTA* that the native rights and interests be 'recognised by the common law of Australia' incorporates into the statutory definition additional requirements derived from the common law prior to the enactment of the *NTA*. One example is Brennan J's statement in *Mabo* that the claimants of communal native title must be members of an 'identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs'.⁶³ This is an approach with precedents in earlier native title cases.⁶⁴

Their Honours then went to some lengths to define the key word 'traditional' in s 223(1)(a) by reference to the Explanatory Memorandum of the *NTA*,⁶⁵ and judicial statements from *Mabo*,⁶⁶ *Ward*⁶⁷ and *Commonwealth v Yarmirr*,⁶⁸ which all indicate that traditional laws and customs need not have remained unchanged since 1788, as long as the current practices are 'based on traditional laws and customs', and 'the general nature of the connection' remains.⁶⁹ 'Traditional' requires an objective assessment that 'the law or custom has in substance been handed down from generation to generation.'⁷⁰ Their Honours are also guided by Brennan J's *Mabo* obiter dictum cited above, requiring an identifiable community.⁷¹

3 *The Test in the High Court*

In the High Court, the notion of tradition undergoes a subtle shift because it is made to operate in careful conjunction with some other parameters, such as the normative nature of rights and interests. On the question of statutory interpreta-

⁶¹ *Yorta Yorta (High Court)* (2002) 194 ALR 538, 571.

⁶² *Ibid* [129].

⁶³ *Mabo* (1992) 175 CLR 1, 61.

⁶⁴ See especially *Western Australia v Commonwealth* (1995) 183 CLR 373 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ), which holds that the *NTA* incorporates the common law 'concept' of native title: at 488; *Commonwealth v Yarmirr* (2002) 184 ALR 113 (Gleeson CJ, Gaudron, Gummow and Hayne JJ) ('*Yarmirr*'), where the High Court discusses the meaning of s 223(1)(c) and the significance of 'recognition by the common law', and suggests that it is principally by operation of common law rules that native title comes to be recognised: at 40–2.

⁶⁵ Explanatory Memorandum, Native Title Bill 1993 (Cth).

⁶⁶ (1992) 175 CLR 1.

⁶⁷ (2002) 191 ALR 1.

⁶⁸ (2002) 184 ALR 113 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁶⁹ *Yorta Yorta (Full Federal Court)* (2001) 180 ALR 655, 665.

⁷⁰ *Ibid* 688–9.

⁷¹ *Ibid* 686.

tion, Gleeson CJ, Gummow and Hayne JJ (in the majority) disagreed with the Full Federal Court's approach to the role of the common law. They held that although native title consisted of the rights to lands recognised by the common law in *Mabo*, its definition was now as described in s 223(1) — a recognition of rights and interests: (a) possessed by the claimants under traditional law and customs currently observed; and (b) through which the claimants have a connection with the land or waters under claim. The relevance of sub-s (c) is that native title rights and interests recognised under the *NTA* must not be antithetical to the common law⁷² and are limited to those rights and interests which survived the change in sovereignty in 1788, as this is the date at which the common law intersected with the indigenous legal system, and it is this intersection that now gives rise to recognition.⁷³ The use in sub-ss (a) and (b) of the present tense, together with the qualifier 'traditional', is what necessitates proof of cultural continuity between the claimants and the ancestors through whom the claim is made.⁷⁴

In his concurring judgment, McHugh J expressed doubt that it was the intention of Parliament to preclude development of the definition by the common law. His Honour had previously held that the *NTA* should be interpreted, if possible, in a way that might achieve its legislative purpose of rectifying 'the consequences of past injustices',⁷⁵ and that 'the title recognised by the *NTA* coincides with the common law's recognition of native title.'⁷⁶ His Honour conceded in the *Yorta Yorta* case, however, that the first view is now the position taken by the High Court.⁷⁷ It is a position that has received some criticism, given that it seems to eschew both local and international common law principles that are the *raison d'être* for native title as it is recognised in the *NTA*.⁷⁸

The majority thus focuses on what it means to say, based on s 223, that native title rights and interests must be possessed under traditional law and custom. Its characterisation of native title as the intersection of two legal or normative systems⁷⁹ draws it into a discussion of the conceptual aspects of native title, exploring three collateral points: the relationship between laws and the society that observes them, the necessarily normative content of rights and interests, and

⁷² This was also the position held in *Ward* (2002) 191 ALR 1, 17 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁷³ *Yorta Yorta* (High Court) (2002) 194 ALR 538, 560.

⁷⁴ *Ibid* 562.

⁷⁵ *Yarmirr* (2002) 184 ALR 113, 150.

⁷⁶ *Ibid* 152.

⁷⁷ *Yorta Yorta* (High Court) (2002) 194 ALR 538, 572–3.

⁷⁸ See Alexander Reilly, 'From a Jurisprudence of Regret to a Regrettable Jurisprudence' (2002) 9(4) *E Law — Murdoch University Electronic Journal of Law* [30]–[37] <<http://www.murdoch.edu.au/elaw/issues/v9n4/reilly94.html>>; Debra Jopson, 'High Court Cruelling Native Title: Pearson', *The Sydney Morning Herald* (Sydney), 18 March 2003, 7; 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, 558–63.

⁷⁹ Note that the word 'system' is given careful treatment, so that it is not confined to the characteristics of a positive European-style body of laws that ignores the 'rich complexity of indigenous societies', and that 'normative' seems to be used to cover the idea of laws *and* customs that provide social principles: *Yorta Yorta* (High Court) (2002) 194 ALR 538, 550–1.

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the consequences of the claim of sovereignty by the Crown for the survival of rights and interests held under traditional law.

B *Rights and Interests Originate in a Normative System* — Gleeson CJ,
Gummow and Hayne JJ

Under an initial caveat about ‘the utility of jurisprudential analysis’⁸⁰ in native title, the High Court majority makes a brief foray into the theories of legal scholars H L A Hart, Julius Stone and Tony Honoré to explain the implications of conceptualising native title as the intersection of two normative systems.

1 *The Requirement of Normativity*

The first point the majority made is that, to be recognised under the *NTA*, the laws and customs must have a *normative* content: ‘without that quality, there may be observable patterns of behaviour but not rights or interests in relation to land or waters.’⁸¹ The work of Hart was introduced as an example of a theory of law that differentiates habit from legal rules.⁸² Once introduced, however, it was immediately set aside: first, because the difference between Aboriginal and European societies (such as particular concepts of property or the presence or absence of a ‘rule of recognition’⁸³) should not preclude the former from being considered to contain a normative system; second, since the definition of native title in s 223 includes both traditional laws *and customs*, there is no need to engage in an Hart-inspired search for legal rules (as opposed to mere moral obligations or habits) in Aboriginal societies.

Despite this apparent unwillingness to impose western concepts of law on indigenous societies, in the final analysis the fact that it is ‘rights and interests’ that must have survived the Crown’s claim of sovereignty was held by the Court to mandate their normative character.⁸⁴ There is a rather disingenuous use of legal theory. It is invoked, waved away as something which ‘may or may not be fruitful’,⁸⁵ and yet, once dismissed, continues to hover like a spectre over the remainder of the Court’s process of rationalisation because of the assumed separation between the normative and the habitual.

Due to this methodology, the question of how to identify the normative from the implicit or the habitual in indigenous culture is not addressed. Hart holds an eminent and fairly orthodox position in jurisprudence, and reference to him in this context is hardly radical. Yet had he been given a fuller reading by the Court, instead of a mere implicit presence, his work may in fact have been ‘fruitful’ here and have added a progressive tenor to the Court’s thinking. Hart argues that

⁸⁰ Ibid 551.

⁸¹ Ibid.

⁸² In differentiating law from moral obligations or habits, Hart’s thesis is that law is characterised by: (1) the existence of primary legal rules (substantive norms regulating social behaviour), together with secondary legal rules (that identify the primary rules); (2) a sense of obligation in relation to the rules by those in the relevant group; and (3) the role of officials in identifying the rules: see H L A Hart, *The Concept of Law* (1961).

⁸³ Ibid.

⁸⁴ *Yorta Yorta (High Court)* (2002) 194 ALR 538, 551.

⁸⁵ Ibid.

the difference between normative behaviour and mere habit lies in the internal sense of obligation felt by those subject to the normative rules. It is the participant's perspective that is fundamental to the character of law.⁸⁶ Robert Cover builds on this concept by explaining that the aggregate of internal perspectives contribute to what he calls the *nomos* of a group — the set of narratives about law that give it meaning, and that transform it from 'a system of rules to be observed, [to] a world in which we live.'⁸⁷

Consequently, the key issue would be whether the Yorta Yorta community members performed their activities relating to the land under a sense of obligation stemming from their traditional normative system, as *they* find it meaningful. While attempts to describe the participants' perspective for the Court would still be exercises in translation, such attempts are at least a starting point that reflects the ethic in *Mabo* that native title issues should not be approached from a purely European perspective.⁸⁸

In fact, the claimants *had* made a case in the Federal Court appeal that the question of identifying laws and customs as traditional should be a subjective matter. However, both the Full Federal Court and the High Court defined the test as an objective one of whether the laws and customs are 'in substance ... handed down from generation to generation',⁸⁹ or whether their acknowledgment has been 'substantially uninterrupted since sovereignty.'⁹⁰ It is hard to see how an assessment of the substance of continuity is not subjective. In terms of *normativity*, which is so dependent on the meaning of actions and the obligation experienced, it is even harder to dismiss the need for the internal perspective, because a person's attitudes to their practices constitute their normative authority in any legal system. Further, despite the need for normativity in the majority's construction of the test, Olney J's treatment of the evidence showed an almost exclusive concern for discrete practices divorced from the underlying normative structures that would make them meaningful, and recounted, in the case of past practices, by an external observer, Curr.

If, on the other hand, the test for the existence of native title were more broadly framed in terms of cultural rather than normative continuity, then because culture can be said to consist of both conscious and unconscious behaviour,⁹¹ it would become apparent that there is a strong argument that the processes of proving native title have privileged 'overt, conscious and publicly

⁸⁶ Hart, above n 82, 56–7.

⁸⁷ Robert Cover, 'The Supreme Court, 1982 Term — Foreword: Nomos and Narrative' (1983) 97 *Harvard Law Review* 4, 5.

⁸⁸ Brennan J and Gaudron and Deane JJ quote Viscount Haldane in the earlier Privy Council decision of *Amodu Tijani v Southern Nigeria Secretary* [1921] 2 AC 399, 35, to argue that native title did not have to be rendered conceptually in terms that are only appropriate to common law systems of property: *Mabo* (1992) 175 CLR 1, 49–50 (Brennan J), 84 (Deane and Gaudron JJ). Deane and Gaudron JJ add that the interests of the 'native inhabitants' must be respected even if they are of a kind unknown to English law: at 63.

⁸⁹ *Yorta Yorta (Full Federal Court)* (2001) 180 ALR 655, 688–9 (Branson and Katz JJ).

⁹⁰ *Yorta Yorta (High Court)* (2002) 194 ALR 538, 562.

⁹¹ See, eg, Pierre Bourdieu, *Outline of a Theory of Practice* (1977), whose term *habitus* denotes the unconscious level of culture; Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (1975).

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elaborated symbols of community’ over ‘what is passed on below the level of consciousness and cannot be expressed from within the community as a “principle”.’⁹² This broader idea of culture makes a finding of abandonment of laws and customs harder to countenance, because claimants are likely to have inherited more traditional law and custom than they are able to articulate, where much has been passed on at a tacit level of cultural reproduction rather than as explicit laws. Emphasising the normative character of rights and interests might be a gesture by the majority towards answering these criticisms because it turns on the existence of principles and not unconscious habit. In the majority’s view, the terms of the *NTA* mandate a concern with (normative) rights and interests, and not with culture in general.

2 *No Parallel Sovereignty*

The second point the majority made is that the consequence of the Crown’s acquisition of sovereignty is that there can be no other legitimate source of rights and interests in Australia. When, through the vehicle of native title, the new legal order recognised traditional rights to land, it can only have been recognising the rights and interests that existed at the time sovereignty was claimed. New rights and interests could not be created because there could be no parallel law-making system.⁹³ The majority here seems to conclusively dismiss suggestions that native title ushers in a form of legal pluralism in Australia — instead, native title is limited to a recognition of what law creates (that is, rights), not what creates law (that is, a sovereign society).⁹⁴ However, because those rights derive from a normative system, once the system has ceased to exist, so too do the rights and interests that form native title.⁹⁵ In order to establish that there is in fact a *continuity* requirement in s 223 — thereby precluding the possibility of the revival of rights and interests — the majority needed to explain what it means for a legal system to cease to exist. It did so by enunciating the link between laws and the society to which they pertain.

3 *Laws Are Socially Derivative*

The modern jurisprudence cited by the majority stands for the proposition that laws do not exist without societies; they are ‘socially derivative and non-autonomous.’⁹⁶ Consequently, if a society ceases to acknowledge its laws and customs, then the particular society defined by the observance of those laws and customs ceases to exist. It is not quite clear how the majority would apply this principle to dispersed communities, where dramatic changes in circumstances produce very different ways in which the ‘original’ culture is practised. In asking whether the survival of mere knowledge of the traditional ways suggests that the

⁹² James Weiner, ‘Diaspora, Materialism, Tradition: Anthropological Issues in the Recent High Court Appeal of the Yorta Yorta’ (2002) 2(18) *Land, Rights, Laws: Issues of Native Title* 1, 3.

⁹³ *Yorta Yorta (High Court)* (2002) 194 ALR 538, 552.

⁹⁴ Note also the approach of the Supreme Court of Canada in *Delgamuukw v British Columbia* [1998] 1 CNLR 14, where Lamer CJ commented that as it does not make sense to talk of rights that burdened the Crown’s underlying title prior to sovereignty, then Aboriginal title to land ‘crystallized’ only at the point of sovereignty: at 69.

⁹⁵ *Yorta Yorta (High Court)* (2002) 194 ALR 538, 553.

⁹⁶ *Ibid* 553, quoting Julius Stone, *The Province and Function of Law* (1946) 649.

society still exists, the judgment seems merely to answer with the original question: has the society, united by observance of a body of law and customs, ceased to exist?⁹⁷

Despite the unsatisfactory treatment of this question, there appears to be a distinction being made here between passing on *knowledge* of the content of laws and customs and the continuation of actual *observance* of the laws and customs. The revival of laws and customs that might occur when people start to observe what was previously transmitted merely as information cannot, according to the majority, recreate ‘traditional’ laws and customs under the definition of native title. This is because they derive from a later *society* that has no law-making power in the face of the monopoly of sovereignty by the Australian state.

4 *Implications of This Test*

With the combination of these three points, the majority clarifies its position that ‘traditional’ in this context requires more than the dictionary definition of something ‘handed down from generation to generation.’⁹⁸ The requirements of the *NTA* and the consequences of the Crown’s claim of sovereignty mean that ‘tradition’ reflects the fundamental nature of native title as being the ‘rights and interests rooted in pre-sovereignty traditional laws and customs.’⁹⁹ As limited as the majority acknowledges Western jurisprudence to be in this context, the inextricable link between law and society is crucial in its schema: in order to show the existence of ‘law’, it is necessary to demonstrate a society that has continued to acknowledge that traditional law *as law*. It must have had a continual normative quality: if merely passed down as knowledge, then the ‘society’ has ceased to exist — it may not be revived (the society ceased along with the laws), and new law may not be made to take its place (there is only one sovereign). Thus, even Aboriginal communities that, from their perspective, acknowledge and practice traditional law,¹⁰⁰ may not be successful under this test if there has been a period in which that tradition lacks what the majority would describe as a normative character.

This test holds to a distinction between *practising* law and custom, and merely *passing down* knowledge of law and custom, even though the Court otherwise accepts that the *NTA*’s definition only requires rights and interests to be *possessed* by the claimants, and not necessarily *exercised*.¹⁰¹ The test begs the question of whether this distinction can be adequately drawn, given that generally in native title jurisprudence there is an understanding that Aboriginal social systems are not easily ascribed the categories of Western law.¹⁰² Even in the

⁹⁷ Ibid 554.

⁹⁸ *Yorta Yorta (High Court)* (2002) 194 ALR 538, 568–9.

⁹⁹ Ibid 561.

¹⁰⁰ Peter Sutton argues that the internal view of the adaptiveness of Aboriginal tradition will depend on whether ‘classical arrangements for recognising rights in country were ... fluid or flexible’: Sutton, above n 10, 137. There appears to be some debate within anthropology as to the adaptiveness of Aboriginal traditional country relationships: at 137–72.

¹⁰¹ See *Ward* (2002) 191 ALR 1, 130 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹⁰² In *Ward v Western Australia* (1998) 159 ALR 483, 504, Lee J said:

The expression [traditional laws and customs] necessarily implies that the words are to be understood from an Aboriginal perspective, not constrained by jurisprudential concepts. Law in

terms of Western jurisprudence referred to by the majority, it seems that the factor differentiating norms from habits — the internal attitude of obligation identified by Hart — may exist even during times when the norm was not being manifested in a particular practice. Lastly, it also seems that the majority has woven these three points to form the same requirement of an identifiable community living under its laws and customs that it held Branson and Katz JJ to have erroneously incorporated through the reference in s 223(1)(c) of the *NTA* to recognition by the common law.

The majority has native title claimants in a bind — a community must continue to acknowledge laws and observe customs in a way that is normative and therefore capable of sustaining rights and interests, rather than mere habits and behaviours. However, another aspect of normativity is completely denied: the fact that legal norms come from a ‘jurisgenic’ or law-creating community.¹⁰³ This is in fact a reiteration of the point that law and society are mutually constitutive and engaged in a dynamic relationship, where laws ‘are constantly negotiated and interpreted within a social arena.’¹⁰⁴ People do not just ‘follow’ laws, which arguably do not have an autonomous existence or identity ‘apart from the activity of interpreting law.’¹⁰⁵ Rather, they give laws meaning through their interpretation in, and application to, daily life, and in that sense they generate the substance of the law. Despite the common belief across Aboriginal Australia that Dreaming law was left by ancestor beings and is not a human artefact,¹⁰⁶ in an interpretive sense people are particularly ‘jurisgenic’ in oral Aboriginal culture. All individuals in society have responsibility for stories, sites and living things that make up Aboriginal ‘law’; ‘life and Law continue to be brought into being’ by performing ceremony and telling stories.¹⁰⁷

In the majority’s schema, claimants must belong to a ‘real live’ Aboriginal society living under traditional laws, but the laws that they must observe are not recognised by Western law to be really alive. They are perceived, instead, to have been preserved in some kind of colonial formaldehyde since 1788 (albeit with the possibility that the mode of practice might have changed), because the ability to breathe ongoing life into them is excluded by the idea of state sovereignty. Despite their reassurances to the contrary, the majority seems to adopt a ‘frozen in time’ approach.

Conversely, indigenous groups who have made successful native title claims — for example, in *Mabo*,¹⁰⁸ *Yarmirr*,¹⁰⁹ *Rubibi Community v Western Austra-*

Aboriginal terms is an aggregation of traditional values, rules, beliefs and practices derived from Aboriginal past ...

¹⁰³ Cover uses the term ‘jurisgenic’ to describe the law-creating capacity of groups of people in providing the normative universes that give meaning to legal rules: Cover, above n 87, 11.

¹⁰⁴ Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Native Title Report 2002* (2003) 32.

¹⁰⁵ See Peter Fitzpatrick’s reading of Ronald Dworkin in Peter Fitzpatrick, *The Mythology of Modern Law* (1992) 5.

¹⁰⁶ Christos Mantziaris and David Martin, *Native Title Corporations: A Legal and Anthropological Perspective* (2000) 36.

¹⁰⁷ Rose, above n 10, 44.

¹⁰⁸ (1992) 175 CLR 1.

¹⁰⁹ (2002) 184 ALR 113.

lia,¹¹⁰ *Ngalakan People v Northern Territory*¹¹¹ and partially in *Ward*¹¹² — may have been successful not because their laws are ‘frozen’, or have not been altered in the time since colonisation, but because the evidence they gave fitted better into a notion of what traditional Aboriginal people should be; for example, knowledge of bush foods and medicines, and the use of Aboriginal words to name places, animals and cultural matters in *Ward v Western Australia*.¹¹³ They have perhaps performed their difference in a way that ‘squares with standardised accounts of “the Dreaming”’.¹¹⁴

The majority’s rejection of legal pluralism is, frankly, incoherent. In committing itself to the recognition of rights and interests in land stemming from an enduring indigenous legal system, Australian common law acknowledged a plurality in sources of the law. To speak of surviving rights and interests, or an enduring legal system, without the capacity to create law, gives the system the character of a shell empty of the organism to animate it and give it social sense. Cover’s argument is that the sources of law are always multiple, and he distinguishes the sources of law — the *nomos* of law that gives it meaning and that derives from groups of people — from the *force* of law — the application of state sanctions.¹¹⁵ This distinction could assist the Court to sensibly reconcile the recognition of the existence of Aboriginal rights in traditional country with their need to uphold the doctrine of state sovereignty.

5 *The Conceptual Foundations of Native Title*

In the Federal Court of Appeal decision in *Ward*, there was a great deal of debate about the conceptual basis for native title. Beaumont and von Doussa JJ in the majority defined native title in terms of a ‘bundle of rights’, such as the right to exclude others, the right to hunt and fish, and so on;¹¹⁶ North J in dissent characterised it as a fundamental interest in land.¹¹⁷ The significance in that case was whether specific rights would be permanently extinguished by the grant of inconsistent rights by the state — ‘yes’ if native title was an aggregate concept of separable rights, ‘no’ if the underlying relationship to the land remained.

While the High Court in *Ward* cursorily agreed with the bundle of rights approach for the purpose of extinguishment because the *NTA* clearly allowed for partial extinguishment ‘to the extent of any inconsistency’ in s 23A, in the Yorta Yorta case the Court does seem to stress the location of rights in the underlying

¹¹⁰ (2001) 114 FCR 523.

¹¹¹ (2001) FCA 653 (Unreported, O’Loughlin J, 5 June 2001).

¹¹² (2002) 191 ALR 1.

¹¹³ ‘Evidence was usually given in English, but most often it was in broken form, using words of the Miriuwung or Gajerrong languages for names of people, places, objects, animals and for description of cultural matters’: *Ward v Western Australia* (1998) 159 ALR 483, 497 (Lee J). Note, however, that evidence introduced in the Yorta Yorta trial to demonstrate linguistic continuity was not discussed by Olney J in his decision. See Heather Bowe, ‘Linguistics and the Yorta Yorta Native Title Claim’ in John Henderson and David Nash (eds), *Language in Native Title* (2002) 101.

¹¹⁴ Povinelli, above n 40, 167.

¹¹⁵ Cover, above n 87.

¹¹⁶ (2000) 170 ALR 159, 189.

¹¹⁷ *Ibid* 353. See Lisa Strelein, ‘Conceptualising Native Title’ (2001) 23 *Sydney Law Review* 95 for an in-depth analysis of these contrasting perspectives.

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legal and cultural system of the traditional owners. Its interpretation of s 223 as requiring a particular character of that system is culturally specific and untenable for the reasons elaborated above. However, even in terms of its own analysis, the Court does not consider whether Olney J dealt with the evidence in a way appropriate to this conceptualisation of native title. In particular, the majority does not query whether Olney J's focus on individual practices (the sticks in the bundle that should be matched to the original sticks and that, once broken, are lost forever) is consistent with the normative system approach, since it emphasises external behaviour rather than normative principles. The emphasis on establishing individual practices as the ground for the recognition of native title also has serious recourse implications, as the determination process risks being caught up in 'costly technicality.'¹¹⁸

James Cockayne has suggested a different metaphor — that of the system as a growing tree. Branches may break off over time, the tree changes and grows, but these do not determine whether the tradition — the tree as an entity — itself survives.¹¹⁹ Although both conceptualisations are translations of indigenous relations to their country, the holistic and organic nature of the tree metaphor seems more consistent with the ends of recognition identified in *Mabo* than does the bundle of sticks.

VII LAW IN THE PRESENT TENSE — THE MINORITY JUDGMENTS

The minorities do not critique the test at the level discussed in this article. However, their differently focused application of the test and their interpretations of tradition do provide a less oppressive framework in which to figure the existence of native title rights and, I would argue, one that does not display the same conceptual flaws as the majority.

A Full Federal Court — Black CJ

In his dissenting decision in the Full Federal Court, Black CJ reiterated that 'traditional' is not a concept that should be associated with things that are incapable of change,¹²⁰ even while adapted laws and customs must, in their essence, still reflect the continuity of a tradition that began before radical title was acquired by the Crown. However, the focus should be on ascertaining which practices are claimed to be traditional laws presently acknowledged, and then working out if they have their origins in tradition, as this allows evolutions to be seen for what they are. Black CJ contended that Olney J's focus on the pre-contact society, and his finding that it had already expired 100 years ago, removed any need to seriously assess current laws and customs. This meant that the question of the possibility of adaptation was put to one side while the judge's attention went towards establishing the dislocation of the Yorta Yorta community

¹¹⁸ Justice Robert French, 'A Moment of Change — Personal Reflections on the National Native Title Tribunal 1994–98' (2003) 27 *Melbourne University Law Review* 488, 521.

¹¹⁹ James Cockayne, 'Members of the Yorta Yorta Aboriginal Community v Victoria: Indigenous and Colonial Traditions in Native Title' (2001) 25 *Melbourne University Law Review* 786, 806.

¹²⁰ *Yorta Yorta (Full Federal Court)* (2001) 180 ALR 655, 666.

and its abandonment of a traditional *lifestyle*,¹²¹ a criterion that does not feature in any definition of native title. It was this restrictive approach to the concept of ‘traditional’ that constituted, for Black CJ, an error of law on the basis of which an appeal should be allowed.

B High Court — Gaudron and Kirby JJ

Like the majority in the High Court, Gaudron and Kirby JJ note that the enunciation of native title as being the rights and interests possessed — that is, in the present tense — together with the qualification of laws and customs that found these rights and interests as traditional ‘imports a necessity for continuity with the past.’¹²² Their Honours chose to remind us, however, that the terms of the *NTA* do not require the *connection* to land and waters in s 223(1)(b) to be traditional, and moreover, that it may be a spiritual rather than a physical connection.¹²³ In describing Olney J’s discussion of the evidence of dispossession, their Honours make it clear that Olney J placed too much emphasis on a lack of physical occupation of the land. When looking for the existence of laws and customs (which he held had been washed away by the tide of history), Olney J’s focus was on those relating to use and occupation of land, rather than the more general terms of s 223(1): that the claimants acknowledged traditional laws and customs which gave them a connection to the land claimed.¹²⁴ It is this misplaced emphasis that constituted, for the minority, the error of law which the majority did not find.

Gaudron and Kirby JJ also placed a different emphasis on the meaning of ‘traditional’. Like the High Court majority, they criticise Branson and Katz JJ for using s 223(1)(c) to import into the test the common law requirement that ‘the relevant Indigenous community had maintained its character as an identifiable community the members of which lived under its laws and customs.’¹²⁵ Unlike the majority, they do not then shape the word ‘traditional’ to do the same work. Even though they concede that continuity of community bears directly on the characteristic of laws and customs as traditional, their focus is on the ordinary usage of tradition as meaning a handing down from ‘generation to generation, often by word of mouth’, rather than a ‘rigid adherence to past practices’.¹²⁶

¹²¹ On this point, see James Cockayne, who is particularly critical of what he calls the valuation of the traditional ‘life-style’ over the maintenance of a socio-legal order to found native title rights and interests: Cockayne, above n 119, 795.

¹²² *Yorta Yorta (High Court)* (2002) 194 ALR 538, 565.

¹²³ Note that in *Ward* (2002) 191 ALR 1, the majority acknowledged that the relationship of indigenous peoples to their country is ‘essentially spiritual’: at 15 (Gleeson CJ, Gaudron, Gummow and Hayne JJ). However, the majority went on to say that this relationship has to be translated into a legal relationship, and left open the issue of whether a purely spiritual as opposed to physical connection to the land would be required under s 223 of the *NTA*: at 32 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹²⁴ *Yorta Yorta (High Court)* (2002) 194 ALR 538, 570.

¹²⁵ *Ibid* 568.

¹²⁶ *Ibid* 569.

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While colonisation made the observance of traditional practices impossible for different reasons, the key was that traditional laws and customs

should have their *origins in the past* and, to the extent that they differ from past practices, the differences should constitute adaptations ... made in accordance with the shared values or the customs and practices of the people who acknowledge and observe those laws and customs.¹²⁷

This formulation works from the perspective of the people who practise the laws and customs, and leaves out the majority's focus on the Aboriginal society that existed pre-sovereignty; its only role is as an undefined source of traditional laws and customs.

C Criticisms of Olney J's Treatment of the Evidence

1 Oral Evidence and Historical Records

Black CJ took some of the criticisms of Olney J's treatment of the evidence a little more seriously than the majority in either court. Unlike Branson and Katz JJ's preference for 'appellate caution' in reversing the findings of fact of a trial judge, Black CJ cautioned against an over-reliance on historical records to inform a claim that must, of its nature, be based on an oral transmission of culture, particularly those details recorded by 'untrained observers, writing from their own cultural viewpoint and with their own cultural preconceptions and for their own purposes.'¹²⁸ Due to the significance to the claimants of a finding that native title had been abandoned, this was held not to be a case where the findings of fact are immune from re-examination.¹²⁹

These comments are consistent with a general acceptance in native title that the laws of evidence need to be flexible.¹³⁰ As examples, the centrality of oral evidence means the rule of hearsay may be waived,¹³¹ and the Federal Court may order a hearing to be held in private in order to respect the cultural concerns of Aboriginal peoples.¹³² Common arrangements include closed sessions to hear specifically women's or men's business,¹³³ or erecting visibility barriers to enable parties who are in traditional 'avoidance relationships' to appear in the same court.

¹²⁷ *Ibid* (emphasis added).

¹²⁸ *Yorta Yorta (Full Federal Court)* (2001) 180 ALR 655, 671.

¹²⁹ *Ibid* 681.

¹³⁰ Prior to the amendment in 1998, s 82(1) of the *NTA* declared that the rules of evidence did not apply to native title proceedings. Section 82(1) now specifies that the laws of evidence are to apply except where the court orders otherwise. This might include orders to reflect the cultural concerns of indigenous parties: s 82(2).

¹³¹ In respect of the applicability of the rule of hearsay to expert testimony in native title, see *Daniels v Western Australia* [2000] FCA 858 (Unreported, Nicholson J, 26 June 2000).

¹³² Michael Black, 'Developments in Practice and Procedure in Native Title Cases' (2002) 13 *Public Law Review* 1, 23–5.

¹³³ See, eg, *Ward* (2002) 191 ALR 1. See also *Western Australia v Ward* (1997) 145 ALR 512; Greg McIntyre and Geoffrey Bagshaw, 'Preserving Culture in Federal Court Proceedings: Gender Restrictions and Anthropological Experts' (2002) 2(15) *Land, Rights, Laws: Issues of Native Title* 1.

The Canadian approach to evidence in Aboriginal title cases also makes it clear that special rules of evidence are required. In the Aboriginal title case of *R v Van der Peet*,¹³⁴ the Supreme Court stated:

a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of Aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in.¹³⁵

Similarly, in *Delgamuukw v British Columbia*,¹³⁶ Lamer CJ found an error of law in the trial judge's treatment of the oral histories of the Gitksan and Wet'suwet'en claimants. Despite the centrality of this evidence to the claimants' case, McEachern CJ at first instance had refused to admit some oral evidence and had not given independent weight to the evidence that was admitted. Lamer CJ stated that as 'Aboriginal rights are truly sui generis, [they require] a unique approach to the treatment of evidence which accords due weight to the perspective of Aboriginal peoples.'¹³⁷

Consistent with this, a sensitivity towards Aboriginal perspectives has influenced judicial interpretation of First Nations treaties in Canada.¹³⁸ For instance, treaties may be interpreted according to the understandings of the Aboriginal signatories as passed down in their oral histories, including, as in the case of *Benoit v Canada*,¹³⁹ the incorporation of oral terms that were not actually intended by the Crown to become treaty rights, but in the context, could be considered to have become a general part of the agreement.¹⁴⁰ While treaty interpretation is not directly relevant to Australian native title, its base lies in general principles of evidence law adapted to the demands of intercultural recognition, and the importance of contextualising historical documents, that have cogency in both jurisdictions.

2 Judging Continuity

From the perspective on tradition developed in the minority judgments, it is possible to criticise Olney J's assessment of the evidence. In finding that certain practices were not traditional, such as the reburial of Aboriginal remains that had

¹³⁴ [1996] 2 SCR 507.

¹³⁵ *Ibid* 559.

¹³⁶ [1998] 1 CNLR 14.

¹³⁷ *Ibid* 48.

¹³⁸ McLachlin CJ confirmed in *R v Marshall* [1999] 3 SCR 456 that, because of their unique nature, Aboriginal treaties in Canada attracted special principles of interpretation, including a preference for the interpretation of common intention that best reconciles the interests of the parties at the time of signing. This approach requires a consideration of the meaning of the treaty terms to both Aboriginal and government parties in the context in which it was signed: at 511–13. Because of linguistic and cultural differences, the content of the treaty agreements, made orally, cannot be assumed to be exhaustively represented by the text of the treaty, and so interpretation should include an appreciation of Aboriginal oral communication concerning the agreement at the time and as passed on through the generations: *R v Badger* [1996] 1 SCR 771, 798–9.

¹³⁹ [2002] FCT 243 (Unreported, Campbell J, 7 March 2002).

¹⁴⁰ The Cree and Dene Aboriginal peoples had inherited an understanding that their treaty included a tax exemption, based on an oral promise given by the Crown representative. This was held to have become a treaty right: *ibid* [5]–[8], [355], [358].

been removed, his Honour had not tried to consider whether such practices had their origins in the past. For example, the discontinuity that Olney J saw in current practices of conservation of resources by taking only what was immediately required, and Curr's observations about the apparent wastefulness of the Yorta Yorta community's ancestors in the 1830s, might conversely be seen as a continuity of 'immediate consumption.'¹⁴¹

One of the first lessons that emerges from critical legal studies and postmodernism is that similarities and differences depend on the categorisations made — they depend on the eye of the beholder.¹⁴² An assessment of whether past behaviour is similar to current behaviour will depend on what categories are considered important by the observer and the interpretations they place on what they see. Is building a corporate skyscraper the same as building a cathedral? Yes, and no: it depends. Kerruish and Perrin, for instance, are highly critical of the faith placed in Curr's accounts as the best evidence of the meaningfulness of the Yorta Yorta community's original occupancy of the area. They are also critical of Olney J's unwillingness to search very far for common elements that might enable current practices to be characterised as having their origins in the past.¹⁴³

In another example from the evidence, Olney J noted that a number of sites that were considered to be sacred by some of the Yorta Yorta community members — middens, oven mounds and scarred trees whose bark had previously been used to make canoes — would in earlier times have been significant only for their utilitarian value.¹⁴⁴ There was no evidence of a greater significance, 'nor that any traditional law or custom required them to be preserved.'¹⁴⁵ Leaving aside the criticism that absence of evidence is not evidence of absence, there is a lack of appreciation here for the way that cultures evolve. In time, objects that cluttered the kitchens of our great grandparents become prized ornaments on sale in antique stores, and in space, the practices of diasporic communities develop and articulate their culture in ways that are not necessary in their homeland where their identity as a member of that community is taken for granted.¹⁴⁶

In sum, although the treatment of evidence operated to a background mantra that 'cultures may adapt over time', Olney J lacked a sufficiently complex appreciation of *how* this adaptation occurs. This arose partly because the internal perspective of the claimants on the meaningfulness of their own culture was not appreciated, and partly due to the temporal focus — on tracing the 'then' to the

¹⁴¹ See Kerruish and Perrin, above n 33, 6.

¹⁴² See, eg, Margaret Davies, *Asking the Law Question: The Dissolution of Legal Theory* (2nd ed, 2002) 8–9. This point has been used to critique categories of Western thought, many of which are assumed to be natural or inherent. From the perspective of a different 'beholder', such as that of a non-European culture, categories such as past–present–future, fact–law or practice–knowledge may not be ascribed meaningful distinctions. See Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (1983) esp ch 8 ('Fact and Law in Comparative Perspective') for an excellent exploration of this.

¹⁴³ Kerruish and Perrin, above n 33, 7.

¹⁴⁴ *Yorta Yorta (Federal Court)* [1998] FCA 1606 (Unreported, Olney J, 18 December 1998) [122].

¹⁴⁵ *Ibid* [122].

¹⁴⁶ Weiner, above n 92, 8.

‘now’ rather than accepting that laws and customs do exist in the present tense (for all people) and undertaking to investigate whether some might have their origins in an indigenous tradition. I would argue that both the internal perspective and the presumption of the survival of indigenous culture fall easily within the terms of the *NTA* and, moreover, are necessary to fulfil the post-colonial motives behind the recognition of native title.

VIII CONCLUSION

In combination with other native title decisions that were handed down in 2002 — *Ward*,¹⁴⁷ *De Rose v South Australia*,¹⁴⁸ and *Wilson v Anderson*¹⁴⁹ — the Yorta Yorta decision has led some commentators to conclude that native title has failed dismally in Australia.¹⁵⁰ The onus is on claimants to prove a substantial continuity in specific practices associated with traditional law and custom in the face of a brutal history that makes this degree of continuity extremely unlikely for the majority of Aboriginal people. Even then, the ‘fragile’ nature ascribed to native title means that rights are easily extinguished.¹⁵¹ It is understandable that while Yorta Yorta community members like Monica Morgan¹⁵² feel that any aspects of culture that have survived should be a cause for celebration, instead they are being denied a sense of Aboriginal identity.

While some suggest that native title was never going to be a panacea for all Aboriginal peoples, and that there are other avenues — such as Heritage Protection legislation — that better suit the aims of some communities, other critics argue that the legislation has been interpreted in an unnecessarily narrow and legalistic manner.¹⁵³ In the Yorta Yorta case, this happened through a focus on specific practices rather than underlying principles or meanings, through an emphasis on the character of past rather than present Aboriginal culture, and through an unwillingness to engage with Aboriginal perspectives on the issues and terms at stake.

McHugh J in *Ward* followed his comments in the epigraph to this article with a suggestion that a better scheme would be to mould the rights of parties to fit what they *ought* to be, in the justice of the circumstances.¹⁵⁴ This comment is also telling, as the original concerns of *Mabo*, framed as that decision was in the language of justice, have been seemingly absent in subsequent decisions. Justice, arguably, should always be the foremost concern of the courts; it should allow decisions to be made about native title that responsibly consider the historical

¹⁴⁷ *Ward* (2002) 191 ALR 1.

¹⁴⁸ [2002] FCA 1342 (Unreported, O’Loughlin J, 1 November 2002).

¹⁴⁹ (2002) 190 ALR 313.

¹⁵⁰ See, eg, Jopson, above n 78, 7; Jennifer Clarke, *Why It’s (Almost) Not Worth Lodging a Native Title Claim* (2003) <<http://www.onlineopinion.com.au/2003/Jan03/Clarke.htm>>; Phil Glendenning, ‘Yorta Yorta Decision a Further Act of Dispossession and Cultural Genocide’ (Press Release, 12 December 2002) <<http://www.erc.org.au/issues/text/yy02.htm>>.

¹⁵¹ See *Ward* (2002) 191 ALR 1, 39 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹⁵² Morgan, above n 1.

¹⁵³ See, eg, Clarke, above n 150.

¹⁵⁴ (2002) 191 ALR 1, 156.

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contexts in which Aboriginal cultures have survived, and without blaming extinguishment on the 'tide of history' or the limitations of statutory drafting.