Articles

Humpies not Houses
Or
The denial of native title: A comparative assessment of Australia’s museum mentality

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The paper considers the place of Indigenous laws and customs in the recognition of rights to traditional land. The study is undertaken in a comparative context considering Australian law in comparison with that of the United States and Canada. The study examines the degree to which the source of rights to traditional land in Indigenous laws and customs is considered to justify the denial of principles of equality and full respect. The degree to which the regard for and requirements with respect to Indigenous laws and customs are warranted and justifiable is considered. The paper concludes that there is an unprincipled preoccupation in Australian law, both in the common law and under the Native Title Act, with Indigenous laws and customs which results in the denial of equality, particularly in the context of extinguishment, undue demands with respect to proof, and the restriction of the content of native title. Australian law reveals a museum mentality and affords a considerable contrast to that of the North American jurisprudence.

1 Recognition: Respect for existing rights under traditional laws and customs

The fundamental legal principle that underpins native title1 and declares its source in traditional laws and customs is that demanding respect for existing rights. In international law this is known as the doctrine of acquired rights. O’Connell has declared it a fundamental principle that such rights ‘must be respected’ and that a ‘change in sovereignty works no effect upon such rights’.2

The common law has given effect to this principle in giving effect to the rights of indigenous inhabitants. The Privy Council declared in Amodu Tijani v Secretary, Southern Nigeria3 a case involving a cession of territory in Southern Nigeria occupied by indigenous people, ‘that a mere change in sovereignty is not to be presumed to disturb rights of private owners’. The

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1 ‘Native title’ is the term used in Australia at common law and in the legislation to describe the traditional land of the indigenous people of Australia.
3 [1921] 2 AC 399 at 407.
decision was subsequently cited by Lord Denning for the Privy Council as providing a ‘guiding principle’ upon the acquisition of sovereignty that ‘Courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected’: Adeyinka Oyekan v Musendiku Adele. Both decisions were relied upon by Hall J in his landmark judgment in Calder v Attorney-General (British Columbia). The significance of these authorities is the reliance placed upon them by all of the majority justices in Mabo v Queensland (No 2) in order to sustain the concept of native title in Australia following the acquisition of sovereignty by the Crown. The source of native title is the rights held by indigenous people prior to the acquisition of sovereignty which fundamental doctrine requires be fully respected. As was explained in Yorta Yorta Aboriginal Community v Victoria ‘the only rights or interests in relation to land or waters, originating otherwise than in the new sovereign order, which will be recognised after the assertion of that new sovereignty are those that find their origin in pre-sovereignty law and custom’.

Existing rights are not perpetually protected. They become subject to the new legal regime and may be modified or extinguished in accord with the powers of the new sovereign. However, general principles of international law suggest that such modification or extinguishment should be non-discriminatory and provide proper compensation. Under the doctrine of full respect for existing rights or ‘acquired rights’ the pre-existing legal system which established those rights and interests does not continue as the arbiter of the extent of rights and interests as against the non-indigenous society:

The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed.

There is no parallel traditional legal system after the acquisition of British sovereignty.

2 Unique or sui generis

The source of native title in traditional indigenous societies, and the connection to land under traditional laws and customs, renders it distinct from

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4 [1957] 1 WLR 876 at 880.
5 (1973) 34 DLR (3d) 145 at 208–9 (SC(Can)).
6 (1992) 175 CLR 1 at 55–7; 107 ALR 1 at 40–1 per Brennan J; see also CLR 82–3; ALR 61 per Deane and Gaudron JJ; at CLR 183–4; ALR 143 per Toohey J, Brennan J also relied upon Re Southern Rhodesia [1919] AC 211.
7 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [44] per Gleeson CJ, Gummow and Hayne JJ.
8 O’Connell, above n 2, pp 380–1.
10 United States v Percheman 32 US (7 Pet) 51 at 86–7 (1833) per Marshall CJ, and see a similar statement in Mitchel v United States 34 US (9 Pet) 711 at 734 (1835). The decisions involved the provisions of the United States Constitution which permitted suits against the United States by citizens. Actions were brought to enforce rights of property in territories succeeded to and incorporated into the Union. It was held that the rights were not abrogated by the act of incorporation.
common law interests and estates. That distinctiveness has been repeatedly emphasised in recent decisions of the High Court of Australia:\textsuperscript{12}

Native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title. Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law: \textit{Fejo v Northern Territory}.\textsuperscript{13}

Chief Justice Dickson in the Supreme Court of Canada in \textit{Guerin v R}\textsuperscript{14} and in \textit{R v Sparrow}\textsuperscript{15} had earlier described native title as sui generis. He declared that indigenous rights to fish were ‘not traditional property rights’. Rather they were ‘rights held by a collective and are in keeping with the culture and existence of that group’. Accordingly ‘Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of . . . the “sui generis” nature of Aboriginal rights’. In \textit{Delgamuukw v British Columbia}\textsuperscript{16} the Supreme Court of Canada characterised the sui generis nature of native title as ‘the unifying principle underlying the various dimensions of that title’.

However, such unique origins do not dictate a treatment of native title that would deny native title equality or full respect or the application of universal principles. They merely contemplate a distinct range of interests to that encountered in the common law. But in \textit{Fejo v Northern Territory} it led the High Court to reject argument by analogy to rights of common or customary rights:

\begin{quote}
[Reference to those rights in the present context is misplaced. They are creatures of the common law . . . the rights that are now in issue — native title rights — are not creatures of the common law . . . very different considerations arise where there is an intersection between rights created by statute and rights that are their origin to a different body of the law and tradition.\textsuperscript{17}]
\end{quote}

The High Court has repeatedly thereafter relied on the perceived sui generis or unique nature of native title to reject arguments by analogy to the common law in support of a native title claim and to deny equality and ‘full respect’ to


\textsuperscript{13} (1998) 195 CLR 96:156 ALR 721 at [46] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

\textsuperscript{14} (1985) 13 DLR (4th) 321 at 337 (SC(Can)). In \textit{Mabo v Queensland (No 2)} (1992) 175 CLR 1 at 89; 107 ALR 1 at 66–7 the grounding of native title in Australia in traditional indigenous society and traditional laws and customs caused Deane and Gaudron JJ to declare that the ‘preferable approach’ was to ‘recognise the inappropriateness of forcing native title to conform to traditional common law concepts and to accept it as sui generis or unique’, citing \textit{Amodu Tijani v Secretary, Southern Nigeria} [1921] 2 AC 399 at 401, 403 and \textit{Guerin v R} (1985) 13 DLR (4th) 321 at 378 (SC(Can)).

\textsuperscript{15} [1990] 1 SCR 1075 at 1112

\textsuperscript{16} [1998] 1 CNLR 14 at [113]

native title. The High Court has relied in part on the statutory nature of native title claims in Australia. It has declared:

The relevant starting point is the question of fact posed by the Act [s 223] what are the rights and interests in relation to land or waters which are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples.\(^{18}\)

The emphasis upon a unique source for native title has enabled an approach by the High Court of Australia whereby traditional laws and customs become a barrier to, and a limitation and weakness of, native title.\(^{19}\) Under conventional principles regarding the acquisition of territory, existing rights and relationships, embodied in the (facts of) the laws and customs of a society are recognised under the law of the acquiring state. Native title under such an approach would be recognised and given ‘full respect’ under the law of the acquiring state. The extent of native title would not be subject to unique limitations as against non indigenous society developed after the acquisition of sovereignty based on traditional laws and customs. However, attaching a unique, sui generis nature to native title has enabled the High Court of Australia to impose unique limitations on native title grounded in both legal systems after the acquisition of sovereignty and to thereby deny giving full respect and equality of treatment to native title.

In particular the unique source and nature of native title has been relied upon to:

- impose barriers to proof by demanding particularisation of each element of every right, requiring proof of substantial maintenance of traditional laws and customs and rejecting the concept of abandonment;
- limit the content of native title by seeking to deny any comprehensive interest, excluding any mineral entitlement, and restricting any possible evolution;
- subordinating ‘fragile’ and ‘weak’ native title to other interests.

This paper examines the degree to which the misplaced emphasis on the unique source of native title has denied equality and full respect to native title, in considerable contrast to Canada and the United States.

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3 Proof

3.1 Traditional homeland of a society

The fundamental inquiry ought to be whether or not the land is the traditional homeland of the claimant society. Brennan J referred to such lands in *Mabo (No 2)* as the ‘home country’ of the Meriam people. Likewise, Deane and Gaudron JJ began their judgment by stating that the issue was the entitlement of the Meriam people to ‘their homelands’, and referred to native title as the right of the native inhabitants to their ‘traditional homelands’. The United States Supreme Court, as quoted by Toohey J in *Mabo (No 2)* has characterised the issue as determinable by reference to whether the territory constituted the ‘ancestral home’. Similarly the Canadian judiciary have referred to ‘traditional homeland’ and ‘ancestral home’:

In accord with such understanding the North American jurisprudence is primarily concerned with the use and occupation of the land by the claimant society. In *Calder v Attorney-General (British Columbia)* Judson J declared that ‘the fact is, when the settlers came, the Indians were there, organised in societies and occupying the land as their forefathers had done for centuries. That is what Indian title means’. In *Calder v Attorney-General (British Columbia)* the Supreme Court of Canada found native title to have existed, subject to extinguishment, to the territory of 1000 square miles over which the Nishga ‘hunted, fished and roamed’. In *Re Paulette and Registrar of Land Titles (No 2)* the Supreme Court of the Northwestern Territories found that the plaintiffs had established native title upon evidence of nomadic hunting, trapping and fishing in accordance with the seasons and the availability of game. In *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* the Federal Court of Canada issued a declaration of native title upon evidence that the Inuit were ‘nomads’ who hunted caribou and fished for survival.

United States authorities to the same effect include *United States v Seminole Indians* and *Confederated Tribes of Warm Springs v United States*, where it was held that native title is not limited to areas where the tribe had permanent villages, but also includes seasonal or hunting areas over which the

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20 (1992) 175 CLR 1 at 61; 107 ALR 1 at 44.
21 (1992) 175 CLR 1 at 77, 87, 100, 105, 115; 107 ALR 1 at 57, 65, 75, 79, 87.
22 (1992) 175 CLR 1 at 189; 107 ALR 1 at 148, referring to *United States v Santa Fe Pacific Railroad Co* (1941) 314 US 339 at 345.
23 (1993) 104 DLR (4th) 471 at 515 per MacFarlane JA (CA(BC)).
25 (1973) 34 DLR (3d) 145 at 156 (SC(BC)).
26 Affirmed by La Forest J in *Delgamuukw v British Columbia* [1998] 1 CNLR 14 at [87]; see also at [58] per Lamer CJ (SC(Can)).
27 (1973) 42 DLR (3d) 8 at 14, 16 (SC(NWT)(Can)).
29 This case was relied upon by Lee J at trial in *Ward on behalf of the Miriuwung and Gajerrong People v Western Australia* (1998) 159 ALR 483 at 501.
30 180 Ct Cl 375 (1967).
31 177 Ct Cl 184 at 194 (1966).
Indians had control even though the areas were used only intermittently, and *Tinglit and Haida Indians of Alaska v United States*\(^{32}\) where it was considered that native title was shown by ‘seasonal rounds of fishing, hunting, gathering and trading expeditions’.

The North American jurisprudence recognises that if a society existed and was sustained by particular traditional lands and waters the traditional legal system must necessarily have provided a regime of rights with respect to such lands and waters: *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development*. There is no requirement to prove the entire regime of traditional laws and customs at the acquisition of British sovereignty or after.

The High Court of Australia in *Mabo v Queensland (No 2)* endeavoured to provide an indication of the elements that go to establishing what constitutes a traditional homeland and therefore native title. But in doing so the Court failed to emphasise that the elements are necessarily linked and interwoven. The elements cannot be treated entirely discretely because they all depend upon the existence of a society or community whose territory constituted the traditional homeland.

The focus of the High Court upon traditional laws and customs, in particular on account of its understanding of s 223\(^{33}\) of the Native Title Act, has distorted the fundamental issue before the court. The High Court has transformed the identification of a traditional homeland into an extraordinarily technical exercise preoccupied with the minutiae of traditional laws and customs and their acknowledgment and observance.

3.2 Particularisation of each and every element of traditional law and custom

The laws or customs of the group regulating its members’ connection to the territory are the manifestation of the society’s relationship to the territory. They reveal the rights and interests of the society which will be recognised. But proof should be concerned with the collective relationship of the society to the land, not the individual relationships of the society’s members inter se. Proof of that relationship should not demand particularisation of each and every element of traditional law and custom, and should be assisted by reference to the society’s use and occupation of the land. Proving the network of individual relationships between indigenous people should not be required, except to illustrate the existence of a system or set of traditional laws, customs

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32 177 F Supp 452 at 457 (1959).
33 In *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 58; 107 ALR 1 at 42, Brennan J declared that ‘native title has its origin in and is given to content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory’. The definition of ‘native title’ in the Native Title Act follows the language of Brennan J in *Mabo v Queensland (No 2)* (1992) 175 CLR 1; 107 ALR 1. In *Western Australia v Ward* (2002) 191 ALR 1 at [16] per Gleece CJ, Gaudron, Gummow and Hayne JJ, it was declared that ‘paras (a) and (b) of s 223(1) [the definition of native title] plainly are based on what was said by Brennan J in *Mabo [No 2]*’ . . . It means the communal, group or individual rights and interests in relation to land or waters:

- possessed under the traditional laws acknowledged and traditional customs observed;
- where, by those laws and customs, there is a connection with the land or waters; and that are recognised by the common law (NTA 1993 s 223(1)).
and usage. Indeed, as Brennan J made clear, communal native title may exist even if on a particular point there is an absence of a rule to determine a point in contest between individual claimants.34

Proof of an individual’s relationship under traditional laws and customs to particular land and water is only necessary, in addition to the collective connection of the group or society, where the individual’s right are in issue, as for example, in a prosecution where the defence is based on a native title right to fish.

But in Western Australia v Ward35 the High Court imposed traditional laws and customs as a significant barrier to the establishment of native title by requiring the particularisation of each and every element of traditional law and custom. The Court required proof as to elements beyond those necessary to prove the nature of the collective rights and interests of the society in the land. The Court focused on the language of s 223 and demanded ‘not only the identification of the laws and customs said to be the traditional laws and customs, but, no less importantly, the identification of the rights and interests in relation to land or waters which are possessed under those laws and customs’. Requirement of such particularisation imposes a significant barrier to proof of native title.

It is suggested contrary to the approach envisaged by the High Court in Western Australia v Ward that the task of establishing that connection to the territory subsisted under the laws or customs of the group should not be overstated. The members of the High Court in Mabo v Queensland (No 2) recognised that if a society existed it would inevitably have a system of laws or customs. The inevitability of the existence of a traditional legal system is most explicitly recognised in the judgment of Toohey J. His Honour observed:36

[I]t is inconceivable that indigenous inhabitants in occupation of land did not have a system by which land was utilised in a way determined by that society.

And, of course, in Milirrpum v Nabalco Pty Ltd37 Blackburn J declared:

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

34 Mabo v Queensland (No 2) (1992) 175 CLR 1 at 62-3; 107 ALR 1 at 45. Similarly, in the same case, Deane and Gaudron JJ point out:

[It is] impossible to identify any precise system of title, any precise rules of inheritance or any precise methods of alienation. Nonetheless, there was undoubtedly a local native system under which the established familial or individual rights of occupation and use were of a kind which far exceed the minimum requirements necessary to found a presumptive common law native title: (1992) 175 CLR 1 at 115–16; 107 ALR 1 at 87–8. To similar effect see, Toohey J at CLR 191; ALR 149.


36 (1992) 175 CLR 1 at 187; 107 ALR 1 at 146; see also, Deane and Gaudron JJ at CLR 115–16; ALR 87–8. This is implicit in Brennan J’s judgment: at CLR 62–3; ALR 44–5.

37 (1971) 17 FLR 141 at 267 (SC(NT)).
It is suggested that the approach of the High Court in *Ward* is fundamentally flawed. It fails to recognise that native title is primarily concerned with the traditional society’s collective rights, not those of individuals. Moreover, the Court refuses to make any assumption that the society must necessarily have had a system of laws and customs that governed the society’s relationship to the land. It entails a very literal reading of the Native Title Act, severed from its origins, context and purpose which renders proof of native title appropriately difficult.

Its impact was evident in *De Rose v South Australia*\(^\text{38}\) where O’Loughlin J considered the evidence led on ‘continuance of traditional laws and customs’ to be inadequate. There were ‘substantial gaps in the evidence about communal and social life, and religious, social and ritualistic activities’ and ‘most importantly, there was a total failure to make any attempt to care for any of the secret sacred sites’. On such a basis the Court rejected the claim for native title, despite having recognised that the group had ‘possessed, occupied, used and enjoyed the claim area to the exclusion of all others’ at least until the early part of the 20th century.

The North American jurisprudence affords a great contrast. It is concerned with proof of use and occupancy by a society. If a society exists then necessarily so do traditional laws and customs which govern the use and occupancy of the land by the society. Further particulars of traditional laws and customs are not necessary:\(^\text{39}\)

### 3.3 Abandonment, and the substantial maintenance of a traditional connection

In order for a court to make a declaration of native title, it must be satisfied that the connection has been ‘substantially maintained’\(^\text{40}\). The substantial maintenance of connection has been interpreted in Australia to require continued acknowledgment of traditional laws and observance of traditional customs, above and beyond that required to establish the continuance of the society. Brennan J in *Mabo v Queensland (No 2)* explained:\(^\text{41}\)

> [W]hen the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.

And:

> Native title . . . is extinguished if the clan or group, by ceasing to acknowledge those laws . . . and (so far as practicable) observe those customs, loses its connection with the land or on the death of the last of the members of the group or clan.\(^\text{42}\)

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\(^{38}\) [2002] FCA 1342 (1 November 2002) at [903], [909], [897], [101].  
\(^{39}\) *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d) 513, *Calder v Attorney-General (British Columbia)* (1973) 34 DLR (3d) 145 (SC(Can)).  
\(^{40}\) *Mabo v Queensland (No 2)* (1992) 175 CLR 1; 107 ALR 1.  
\(^{41}\) (1992) 175 CLR 1 at 60; 107 ALR 1 at 43.  
\(^{42}\) *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 70; 107 ALR 1 at 51 per Brennan J.
The High Court in *Yorta Yorta Aboriginal Community v Victoria* 43 recently affirmed the need for ‘continuity of acknowledgment and observance [as] a condition for establishing native title’ under the Native Title Act.

Such a requirement is a major failing of that interpretation of the common law and s 223(1)(a) of the Native Title Act. Under conventional principles regarding the acquisition of territory, existing rights and relationships are recognised as a fact under the law of the acquiring state. The native title relationship under such an approach would be recognised and given ‘full respect’ under the law of the acquiring state. The acknowledgment of traditional laws and observance of traditional customs after sovereignty are relevant only to the demonstration of the continuance of the society and to regulate relationships between members of the society. The requirement represents a refusal to give effect to the relationship established at the acquisition of sovereignty.

The denial of principle is compounded in Australia by the imposition of the onus upon the claimant group to show that traditional laws and customs have been maintained and not abandoned, contrary to common-law jurisprudence elsewhere. Upon native title being proven to exist at the time of sovereignty, there is a presumption in other jurisdictions that it continues thereafter. In *Amodu Tijani v Secretary, Southern Nigeria* 44 Viscount Haldane declared:

> The original native title right was a communal right and it must be presumed to have continued to exist unless the contrary is established . . .

In *Calder v A-G (British Columbia)*, 45 Hall J cited *Amodu Tijani* with approval and observed:

> Once Aboriginal title is established it is presumed to continue until the contrary is proven . . .

Canadian authority is clear that the onus of showing abandonment is upon the party who seeks to assert the discontinuance of native title. In *Delgamuukw v British Columbia*, 46 the Crown argued that ‘many of the areas claimed by the plaintiffs have been abandoned by long-term non-Aboriginal use’. The Chief Justice concluded that ‘no doubt Aboriginal activities have fallen very much into disuse in many areas’, but concluded that because the onus of proof rested upon the Crown to show abandonment, ‘it would be unsafe and contrary to principle to apply the principle of abandonment to such an uncertain body of evidence’.

Moreover, abandonment of other interests in other jurisdictions must be voluntary. Abandonment requires both the physical element *and animus* of giving up the interest. 47

Consideration of native title in the United States led the Court of Claims to

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43 (2002) 194 ALR 538 at [90] per Gleeson CJ, Gummow and Hayne JJ.
44 [1921] 2 AC 399 at 401.
45 (1973) 34 DLR (3d) 145 at 208.
declare that ‘beyond doubt, abandonment of claimed Indian Territory by the Indians will extinguish Indian title’. However, the issue of abandonment is one of intention to relinquish, surrender and unreservedly give up claims to title . . . the source from which to arrive at such an intention is the facts and circumstances of the transaction involved. Forcible ejection from the premises or non-user under certain circumstances, as well as lapse of time, are not standing alone sufficient to warrant an abandonment.48

Native title in the United States is not considered to be abandoned by failing to resist white encroachment49 or being involuntarily forced on a reservation.50

The explanation for the onus lying upon the party seeking to assert non-maintenance has both a practical and a principled basis. Practically, the imposition of the onus upon indigenous people to prove maintenance to the present, in circumstances where indigenous people have no written records and 'traditions are largely oral in nature', may ‘impose an impossible burden of proof’ which ‘would in effect, render nugatory any right’.51 Moreover, the principles of full respect and equality require that native title be presumed to continue. Possession or an easement may be considered an analogous interest for this purpose. Once possession is established, it gives rise to a right of possession which is presumed to continue, irrespective of whether or not the original party remains in possession:

However, a substantial body of Australian jurisprudence dictates that the onus to show substantial maintenance, that is, to show abandonment has not occurred, is on the claimant. In Yorta Yorta the majority of the High Court upheld the requirement of such proof of substantial maintenance of connection under the Native Title Act, and did not accept that upon proof of connection prior to British sovereignty a presumption in favour of continuity should operate. The majority rejected the concept of abandonment, whereby the onus would be upon gainsayers of native title to show abandonment, including an intention to abandon:

Describing the consequences of interruption in acknowledgment and observance of traditional laws and customs as ‘abandonment’ or ‘expiry’ of native title is apt to mislead. ‘Abandonment’ might be understood as suggesting that there has been some conscious decision to abandon the old ways, or to give up rights and interests in relation to the land or waters. Demonstrating continuous acknowledgment and observance of traditional laws and customs would, of course, negate any suggestion of conscious decision to abandon rights or interests. But the inquiry about continuity of acknowledgment and observance does not require consideration of why, if acknowledgment and observance stopped, that happened. That is, continuity of acknowledgment and observance is a condition for establishing native title.52

48 Fort Berthold Indians v United States 71 Ct Cl 308 at 334 (1930); Quapaw Tribe v United States 120 F Supp 283 at 283, 286 (1954).
49 Seminole Indians v United States 13 Ind Cl Com 326, 362-3(1964) (affirmed 180 Ct Cl 375 (1967)).
51 Simon v R [1985] 2 SCR 387 at 408.
52 (2002) 194 ALR 538 at [89,90] per Gleson CJ, Gummow and Hayne JJ.
The impact of the requirement of continued acknowledgment of traditional laws and observance of traditional customs, above and beyond that required to establish the continuance of the society and the imposition of the onus to show substantial maintenance of the traditional connection was graphically depicted in *De Rose v South Australia*.\(^{53}\) The Court rejected the claim because of the failure to prove continuing connection after 1978. The combined effects of an emphasis on particularising acknowledgment and observance of traditional laws and customs, and the demands of proof that acknowledgment and observance of such laws and customs be maintained to the present, not merely 20 years before the claim, must deny most claims.

## 4 Content

### 4.1 Ownership or possession

If a traditional indigenous group or society sustained themselves and used the land to the exclusion of other groups or societies, it might properly be asserted that it possessed complete rights over the land. The giving of ‘full respect’ to the exclusive rights over the land would require acknowledgment of the ‘full beneficial ownership’ of the group or society. Exclusive use and occupation of lands by a traditional indigenous group or society would thereby be accorded the same respect as non-indigenous use and occupation. In *Mitchel v United States*\(^{54}\) the United States Supreme Court has accorded such respect:

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to *its exclusive enjoyment in their own way* and for their own purposes were as much respected . . . [Emphasis added]

The decisions of the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria* and of the High Court in *Geita Sebea v Territory of Papua* support such a result. In both cases the indigenous interest was a communal usufruct in an agricultural society. The courts awarded compensation for compulsory acquisition on the basis of ‘full ownership’\(^{55}\) or a ‘fee simple’\(^{56}\) interest.

#### 4.1.1 The United States

Pragmatic considerations were *not* relied upon to limit the content of native title in the landmark judgments of Chief Justice Marshall in the first part of the nineteenth century. In *Johnson v McIntosh*\(^{57}\) the Chief Justice in his statement of governing principles declared of the indigenous right:

> They were admitted to be rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to *use it according to their own discretion* . . . [Emphasis added]

In 1835, the court described the Indian right of occupancy as entailing ‘rights to its [the land’s] exclusive enjoyment in their own way and for their

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54 34 US (9 Pet) 711 at 746 (1835).
55 [1921] 2 AC 399, 411.
56 (1941) 67 CLR 514 at 555.
57 8 Wheat 543 at 574; 5 L Ed 681 at 688 (1823).
own purposes': *Mitchel v United States*. It was a ‘settled principle that their right of occupancy is considered as sacred as the *fee simple* of the whites’. 58

In *United States v Shoshone Tribe of Indian*59 and *United States v Klamath and Moadoc Tribes*60 the Indian title was held to extend to the commercial exploitation of minerals and the timber. According to Felix Cohen, the decisions in *Shoshone* and *Klamath and Moadoc* ‘delivered a death blow to the argument that Aboriginal ownership extends only to products of the soil actually utilised in the stone age culture of the Indian tribes’. 61

Subsequent United States courts have repeatedly reached the same conclusion and assessed compensation under the Indian Claims Commission Act 1946 (US) ss 70–70V as that due on account of full beneficial ownership, including minerals and timber. 62

The decisions of the United States Supreme Court suggest that upon the basis of giving ‘full respect’ an indigenous group or society which exercised exclusive rights over the land, whatever their character or manner, should be regarded as holding native title tantamount to full beneficial ownership including all resources. The United States jurisprudence does not consider that the pragmatic need to give effect to United States sovereignty and European settlement justified the impairment of the content of native title.

### 4.1.2 Canada

The foundation of native title upon the application of universal principle and equality led Dickson J of the Supreme Court of Canada to observe in obiter in *Guerin v R*63 that native title ‘rights of occupancy and possession remain unaffected’ by the change of sovereignty. Dickson J went on to quote and emphasise that portion of the judgment in *Johnson v McIntosh* which had declared the native title right to ‘use [the land] according to their own discretion’. Dickson J concluded that Indians have a ‘legal right to occupy and possess’ such lands. 64

However, *Guerin v R* concerned Indian reserve lands and such obiter dicta had not subsequently been applied to native title till *Delgamuukw v British Columbia*. 65 In that case, the appellants argued before the Supreme Court of Canada ‘that Aboriginal title is tantamount to an inalienable fee simple’, while the respondents argued that it was limited to those rights traditionally integral to indigenous cultures. Chief Justice Lamer determined that ‘Aboriginal title encompasses the right to *exclusive use and occupation* of the land held pursuant to that title for a variety of purposes, which need not be aspects of

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58 34 US (9 Pet) 711 at 746 (1835). The court also referred to British law as contemplating a ‘perpetual right of possession in the tribe or nation’: 34 US (9 Pet) 711 at 745. See also, *Cherokee Nation v Georgia* 30 US 1 at 48 (1831) per Baldwin J; *Beecher v Wetherby* 95 US 517 at 526 (1877).

59 304 US 111 (1938).

60 304 US 119 (1938).

61 F S Cohen, ‘Original Indian Title’ (1947) 32 Minnesota LR 28 at 55.

62 *Otoe and Missourri Tribe v United States* 131 F Sup 265 at 290 (1955) (Ct CI USA); *Miami Tribe of Oklahoma v United States* 175 F Supp 926 at 942 (1959) (Ct CI USA).


65 [1998] 1 CNLR 14 at [116-117](SCCan).
those Aboriginal practices, customs and traditions which are integral to distinctive Aboriginal cultures’.

Chief Justice Lamer assumed the application of universal principles and principles of equality in finding ‘exclusive use and enjoyment’ to be the content of native title. He laid emphasis on the source of native title in the ‘physical fact of occupation’ of the land by indigenous people, and accordingly applied the universal ‘common law principle that occupation is proof of possession in law’.

4.1.3 Australia

The particular circumstances of *Mabo v Queensland (No 2)* resulted in an Order of the High Court of Australia that the content of native title of the Meriam people amounted to an entitlement ‘as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands’.66 All members of the majority concurred in such conclusion but offered little explanation beyond minimal reference to the facts of occupation by the society comprising the Meriam people. There was no requirement of a specific delineation of traditional laws and customs, but rather an acknowledgment that the society had ‘substantially maintained’ its ‘traditional connection with the land’. In the result the declaration amounts to a recognition of full beneficial ownership.

A finding of full beneficial ownership is supported by the application of universal principles otherwise declared by the High Court in *Mabo v Queensland (No 2)* and applied in the context of extinguishment in *Wik Peoples v Queensland*.67 It also finds support in the general comment of Brennan J in *Mabo (No 2)*68 that:

> The ownership of land within a territory in the exclusive occupation of a people must be vested in that people.

But the focus of the dicta on traditional laws and customs suggested an unwillingness to make an order for exclusive use and enjoyment with respect to what were originally hunter-gatherer indigenous societies and make a finding of beneficial ownership of minerals for the purpose of commercial exploitation for example, less likely.

In *Ward on behalf of the Miriuwung and Gajerrong People v Western Australia*69 Lee J declared that native title provided ‘a right of occupation that prevails against all but the Crown’. He particularised native title in the Order to include rights to ‘possess, occupy, use and enjoy’ the area and its ‘resources’ and to control access. Lee J relied on the authority of the High Court in *Mabo v Queensland (No 2)* and *Geita Sebea v Territory of Papua*, the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria* and the established jurisprudence of the United States and Canadian Supreme Courts. He accordingly applied universal principles and gave ‘full respect’ to the indigenous interest.

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66 See (1992) 175 CLR 1 at 217 and 75; 107 ALR 1 at 169–70, and 55–6 per Brennan J.
67 (1996) 187 CLR 1; 141 ALR 129.
68 (1992) 175 CLR 1 at 51; 107 ALR 1 at 36.
But on appeal in Western Australia v Ward\(^70\) the High Court required the particularisation of each and every element of traditional law and custom — stifling any larger claim to a more global or comprehensive right. The court was not prepared to recognise that a society, necessarily with a system of traditional laws and customs, which occupied an area at sovereignty could be presumed to be the ‘owners’ of the area. Such an assumption was ‘not useful, because it assumes, rather than demonstrates, the nature of the rights and interests that are possessed under traditional laws and customs’. Indeed in the majority’s view:\(^71\)

The fact of occupation, taken by itself, says nothing of what traditional law or custom provided. Standing alone, the fact of occupation is an insufficient basis for concluding that there was what the primary judge referred to as ‘communal title in respect of the claim area’ or a right of occupation of it. If, as seems probable, those expressions are intended to convey the assertion of rights of control over the land, rights of that kind would flow not from the fact of occupation, but from that aspect of the relationship with the land which is encapsulated in the assertion of a right to speak for country.

There was a marked reluctance to translate exclusive use of the land under traditional laws and customs into a right of possession or ownership. Lee J found that the claimants occupied the land under traditional laws and customs, including the right to speak the country. But the High Court was uncomfortable with the notion of traditional laws and customs giving rise to ‘ownership’ or ‘possession’: The Court acknowledged that ‘it is the right under traditional law and customs to be asked permission and to “speak for country” that are expressed in common law terms as the right to possess, occupy, use and enjoy land to the exclusion of all others’ at [88]. But despite the primary judge’s finding of such a right the High Court remitted the determination to the full Federal Court because of the ‘limited findings by the primary judge and by the full court as to the relevant content of the native title rights and interests’ at [195].

The demand for the particularisation of rights has severely restricted the scope of subsequent declarations of native title rights and interests. In Daniel v State Western Australia\(^72\) the court made a determination that the claimants held non-exclusive native title rights and interests only as to:

(a) Access
   A right to access (including to enter, to travel over and remain)

(b) Ritual and ceremony
   A right to engage in ritual and ceremony (including . . . to carry out and participate in initiation practices . . .)

(c) Camping
   A right to camp, build shelters (including boughsheds, mias and humpies) . . . or to live on the area.

(d) Hunting and foraging

\(^70\) (2002) 191 ALR 1 at [84].  
\(^71\) (2002) 191 ALR 1 at [93].  
A right to hunt and forage.

(e) Fishing

A right to fish and take fauna from the waters.

(f) Bush medicine and tucker

A right to collect and forage for bush medicine and (bush) food.

(g) Take fauna

A right to take fauna (including fish, shellfish, crab, oysters, sea turtle, dugong, goanna, Kangaroo, emu, turkey, echidna, porcupine, witchetty grub, turkey, swan)

(h) Take flora

A right to take flora (including timber logs, branches . . . bark and leaves, gum, wax . . . Aboriginal tobacco, fruit, peas . . . pods melons, bush cucumber . . . seeds, nuts, grasses, potatoes, wild onion . . . honey)

(i) Take ochre

A right to take black, yellow, white and red ochre.

(j) Take and use water

A right to take water for drinking and domestic use.

(k) Cook and light fires

A right to cook on the land including light a fire for this purpose.

(l) Protect and care for sites and objects

A right to protect and care for sites and objects of significance in the area (including a right to impart traditional knowledge concerning the area, while on the area, and otherwise, to succeeding generations and others so as to perpetuate the benefits of the area and warn against behaviour which may result in harm).

The determination made in Daniel is a list of ‘frozen’ traditional rights.

4.2 Evolution of native title

The High Court in Mabo v Queensland (No 2) had accepted that the incidents and content of native title are not ‘frozen’.73 The content of native title changes and evolves with the relationship of the indigenous society to the land. Brennan J observed:

The traditional law or custom is not, however, frozen as at the moment of the establishment of the colony. Provided any changes do not diminish or extinguish the relationship between a particular tribe or other group and particular land, subsequent development or variations do not extinguish the title in relation to that land. [(1992) 175 CLR 1 at 110; 107 ALR 1 at 83].

Further, Toohey J expressly recognised the changes traditional societies undergo following contact with Europeans:

There is no question that indigenous society can and will change on contact with European culture. Since annexation a school, a hospital, the Island Court, the Island Council, a police force and other government agencies have been introduced to the Islands . . . The economy of the Islands is now based on cash from employment rather than on gardening and fishing . . . [(1992) 175 CLR 1 at 192; 107 ALR 1 at 150].

73 (1992) 175 CLR 1 at 70; 107 ALR 1 at 51 per Brennan J and Deane and Gaudron JJ.
It is immaterial that the laws and customs have undergone some change since the Crown acquired sovereignty provided the general nature of the connection between the indigenous people and the land remains.

This understanding was affirmed by the High Court in Members of the Yorta Yorta Aboriginal Community v Victoria. At trial Olney J failed to acknowledge the dynamic nature of traditional society. He adopted the requirement that the required acknowledgment and observance of traditional laws and customs be of that form ‘frozen’ or nearly so as at the acquisition of sovereignty. Fishing was declared to be conducted as a ‘recreational activity rather than as a means of sustaining life’, as though living entirely from food gathered on the land was a requirement of establishing native title. Emphasis was placed upon a failure ‘to observe traditional practices in relation to initiation or to perform other ceremonial activities’. Olney J’s approach was that of ‘frozen’ traditions and of the ‘museum’, rather than an approach based upon examination of the connection between a changing Aboriginal society and the land.

But on appeal the High Court declared that the ‘key question is whether the law and custom can still be seen to be traditional law and traditional custom. Is the change or adaptation of such a kind that it can no longer be said that the rights or interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified?’ If the adaptation is in accordance with the laws and customs of the ongoing society it should not deny their character as ‘traditional’.

The High Court’s acceptance of the changing nature of traditional laws and customs is however subject to its recent insistence on the particularisation of each and every element of traditional law and custom in Western Australia v Ward. Particularisation of rights is likely to have the effect of restricting evolution, as it did with minerals, of native title rights and interests. The particularisation of traditional laws and customs entails a ‘frozen rights’ approach. Kirby J, in dissent, argued in support of the:

... extension of such recognition to modern conditions, developed over time, so as to incorporate the use of other minerals and resources of modern relevance. Such an approach is generally consistent with the authority of this Court and decisions in Canada. When evaluating native title rights and interests a court should start by accepting the pressures that existed in relation to Aboriginal laws and customs to adjust and change after British sovereignty was asserted over Australia. In my opinion it would be a mistake to ignore the possibility of new aspects of traditional rights and interests developing as part of Aboriginal customs not envisaged, or even imagined in the times preceding settlement.

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77 And see Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [114]–[116] per Gaudron and Kirby JJ.
78 (2002) 191 ALR 1 at [18] per Gaudron CJ, Gummow, and Hayne JJ.
79 (2002) 191 ALR 1 at [574]
Particularisation of rights led to the list of ‘frozen’ traditional rights determined to exist in *Daniel v State Western Australia*. The frozen nature of those rights was made startlingly clear in Nicholson J’s finding that the ‘applicants camp from time to time and for that purpose build shelters (including boughsheds, mias (mayas) and humpies and live there. I do not consider the evidence establishes the activity extends to building houses other than shelters’.80 The claimants had a right to build humpies but not houses!

A similar observation was made in *De Rose v South Australia*81 where O’Loughlin J expressed reservations as to the opinion of Branson and Katz JJ in *Yorta Yorta* that ‘the purchasing by members of an indigenous community of food from a supermarket does not, of itself, demonstrate a loss by that community of traditional connection with land or waters’:

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

North American jurisprudence has rejected the ‘frozen rights’ approach to the content of native title. In the United States native title has been equated with exclusive use and enjoyment. The common law gave full effect to the exclusive relationship of the indigenous society to the land. Native title was regarded as entailing all beneficial uses of the land. Any changes in the relationship and manner of use of the land are considered as properly within the scope of native title. The United States government gave effect to that recognition in treaties and agreements. As Attorney-General (later Justice) Stone observed in an opinion:

If the extent of the Indian rights depended merely on definitions, or on deductions to be drawn from descriptive terms, there might be some question whether the right of ‘occupancy and use’ included any right to the hidden or latent resources of the land, such as minerals or potential water power, of which the Indians in their original state had no knowledge. As a practical matter, however, that question has been resolved in favour of the Indians by a uniform sense of legislative and treaty provisions beginning many years ago and extending to the present time.82

Lower court decisions in Canada had tended to reject the possibility of the evolution of native title, and, combining such rejection with a determination of content by reference to traditional practices and customs, had applied a ‘frozen rights’ approach.83 These decisions seemed out of step84 with the

80 [2003] FCA 666 (3 July 2003) at [140]–[1163].
81 [2002] FCA 1342 at [500].
83 Attorney-General (Ontario) v Bear Island Foundation (1985) 49 OR (2d) 353 at 391 (SC(Ont) (Can)); *Delgamuukw v R* (1991) 79 DLR (4th) 185 at 458 (SC(BC)).
84 In both *Re Paulette and Registrar of Land Titles (No 2)* (1973) 42 DLR (3d) 8 and *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d) 513 at 526–29 the gathering of people in modern settlements and the use of modern technology was not considered to deny native title nor to lie outside its scope. Mahoney J in *Hamlet of Baker Lake* (1979) 107 DLR (3d) 513 at 527, 544 described the use of snowmobiles for hunting, trapping and fishing and declared that the change was of ‘no relevance’.
understanding of the Supreme Court of Canada as expressed in Guerin v R and
Re Paulette and Registrar of Land Titles (No 2) and were rejected by the
Supreme Court in Delgamuukw v British Columbia. Chief Justice Lamer
concluded that native title encompasses ‘exclusive use and occupation of the
land held pursuant to that title for a variety of purposes’,85 including mineral
ownership. The court thereby gave effect to the exclusive relationship of the
indigenous society to the land. The Chief Justice, however, also declared the
existence of an ‘inherent limit’ that no use could be ‘irreconcilable’ with the
‘physical and cultural relationship’ of the society to the land. The limit
underlines the foundation of native title in the relationship of the society to the
land. As the relationship changes and evolves, so does the limit. The content
of native title will accordingly evolve with the society’s relationship to the
land. Manifestly, the limitation does not restrict ‘the use of the land to those
activities that have traditionally been carried out on it’.

4.3 Minerals and timber

In the United States and Canada native title has been held to consist in
exclusive use and enjoyment of traditional territory, including commercial
exploitation of minerals and timber. Exclusive use and occupation by a
traditional indigenous society was accorded the same respect as
non-indigenous use and occupation. At common law rights to the surface
included rights to the base minerals.

In Australia in Mabo v Queensland (No 2) the High Court declared that
native title extended to exclusive ‘use and enjoyment’ of the Murray Islands.
The order of the court could be interpreted to extend to commercial
exploitation of minerals and timber, subject of course, to questions of
extinguishment by mining and forestry legislation.

But an approach demanding proof as to particular traditional laws and
customs, accompanied by a reluctance to give effect to possession or
ownership, as adopted in Western Australia v Ward was unlikely to encompass
contemporary forms of resource exploitation and so it proved in Ward.

At trial in Ward on behalf of the Miriwoong and Gajerrong People
v Western Australia Lee J determined that the content of native title included
the right to use and enjoy, ‘to trade in’, and ‘to receive a portion of any
resources’ (order of court). Native title provided ‘a right of occupation that
prevails against all but the Crown’.86 The reliance by Lee J on United States
and Canadian decisions, as well as those of the High Court and Privy Council,
suggested that the decision extended to mineral and petroleum resources.

On appeal in Ward87 the majority in the High Court rejected the finding at
trial because there was ‘no evidence of any traditional Aboriginal law, custom
or use’ relating to minerals or petroleum, other than ochre and accordingly ‘no
relevant native title right or interest was established’. The majority confirmed
its reluctance to find substantial rights without particular proof of each and
every right held under traditional law or custom.

85 [1998] 1 CNLR 14 at [117] and see [124]–[132].
87 (2002) 191 ALR 1 at [382].
5 Extinguishment

5.1 Full respect, equality and the requirement of a clear and plain intention to extinguish

‘Full respect’ requires that native title not be extinguished by the exercise of sovereign power except in accord with the same principles that apply to other interests. It suggests that any extinguishment or impairment of native title be authorised by clear and plain legislative authority. As Toohey J in Mabo v Queensland (No 2) observed:88

[T]o say that, with the acquisition of sovereignty, the Crown has the power to extinguish traditional title does not necessarily mean that such a power is any different from that with respect to other interests in land. The Crown has the power, subject to constitutional, statutory or common law restrictions, to terminate any subject’s title to property by compulsorily acquiring it. [Emphasis added]

Toohey J explained:89

[W]here an executive act is relied upon to extinguish traditional title, the intention of the legislature that executive power should extend this far must likewise appear plainly and with clarity.

Despite his agreement with a general rationale of ‘full respect’, Brennan J in Mabo v Queensland (No 2) declared a unique status for native title in regard to extinguishment. He concluded that an executive grant inconsistent with native title would suffice to bring about extinguishment irrespective of any clear and plain legislative intention.

Brennan J sought to explain the unique status of native title in terms of its distinct origin:90

When validly made, a grant of an interest in land binds the Crown and the Sovereign’s successors . . . an interest validly granted by the Crown or a right or interest dependent on an interest validly granted by the Crown cannot be extinguished by the Crown without statutory authority. As the Crown is not competent to derogate from a grant once made, a statute which confers a power on the Crown will be presumed (so far as consistent with the purpose for which the power is conferred) to stop short of authorising any impairment of an interest in land granted by the Crown or dependent on a Crown grant.

By contrast:

But as native title is not granted by the Crown, there is no comparable presumption affecting the conferring of any executive power on the Crown the exercise of which is apt to extinguish native title.

Brennan J reasoned that because native title was not derived from a Crown grant it was susceptible to extinguishment by executive act of the Crown. The reasoning does not explain why native title should be so susceptible beyond a recitation of a principle that the Crown cannot derogate from its own grant. There is no explanation of why such a principle should necessarily give

88 (1992) 175 CLR 1 at 193–4; 107 ALR 1 at 151.
89 (1992) 175 CLR 1 at 196; 107 ALR 1 at 153.
90 (1992) 175 CLR 1 at 63–4; 107 ALR 1 at 46.
paramountcy to Crown grants over native title, which was not part of the regime the principle contemplated.

In the subsequent case of *Wik Peoples v Queensland*\(^{91}\) the court was badly split. The majority did not accept a lesser status for native title at common law, but suggested that it was subject to extinguishment, like any other estate or interest, only when legislation clearly required such result. Brennan CJ wrote a dissent affirming his earlier view in *Mabo*.

In the majority judgment in *Western v Ward*\(^{92}\) the requirement of a clear and plain intention is mentioned but is essentially ignored. The majority favoured the dissenting judgment of Brennan CJ in *Wik*. The judgment focused on the question of inconsistency of rights, uninformed by the requirement of a clear and plain intention. Inevitably the judgment delivered ‘bucketloads of extinguishment’.

In the United States Supreme Court in *Johnson and Graham v McIntosh*\(^{93}\) Chief Justice Marshall compromised universal principles and equality in order to give effect to the European settlement of the United States. But the Chief Justice did not recognise a power to extinguish native title merely by inconsistent grant per se without legislative authority to extinguish. Native title was to be protected ‘while in peace, in the possession of their lands’. Native title could be extinguished by ‘conquest’, ‘by the sword’,\(^{92}\) but not merely by inconsistent grants and dispositions by the Crown. The Chief Justice may have compromised universal principles with respect to extinguishment ‘by the sword’ to give effect to sovereign acts of conquest, but not with respect to methods of extinguishment in peace time. The subsequent decision of the United States Supreme Court in *United States v Sante Fe Pacific Railroad Co*\(^{93}\) affirmed the power to extinguish ‘by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy’, but only pursuant to clear and plain Congressional legislative authority.

The issue has been repeatedly reviewed and the principle affirmed by the Supreme Court of Canada. In *Calder v Attorney-General (British Columbia)*\(^{94}\) Hall J stated:

> Once Aboriginal title is established, it is presumed to continue until the contrary is proven . . . It would, accordingly, appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent [the Crown] and the intention must be ‘clear and plain’.

### 5.2 Burden of proof

The Australian courts have most recently taken the position that the legal or ultimate burden of proof lies upon the claimants to negative extinguishment. On a claim under the Native Title Act the claimants must meet the conditions specified in s 223(1) of the Native Title Act which have been interpreted to require the establishment of the continuity of the acknowledgment of

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91 (1996) 187 CLR 1; 141 ALR 129.
92 8 Wheat 543 at 587, 590; 5 L Ed 681 at 692 (1823).
93 314 US 339 at 347 (1941).
94 (1973) 34 DLR (3d) 145 at 208, 210 (SC(Can)).
traditional laws and observance of traditional customs which give rise to a
native title connection to land or waters.\textsuperscript{95} The unanimous full Federal Court
in \textit{Ward} held that:

the ultimate burden of proof rests on the applicants to establish that
extinguishment has not occurred. This is so as the applicants must ultimately show
that there currently exists native title rights and interests, and they will fail if the
rights and interests asserted have at an earlier time been extinguished by law or
Crown grant.

Leave to appeal was refused by the High Court.

Jurisprudence from elsewhere in the common law world is to the contrary
of that in Australia. The jurisprudence is overwhelmingly in favour of the onus
lying upon the Crown consistent with a presumption against extinguishment.
In \textit{Amudu Tijani v Secretary, Southern Nigeria}\textsuperscript{96} Viscount Haldane in the
Privy Council said:

The original native right was a communal right, and it must be presumed to have
continued to exist unless the contrary is established by the context or circumstances.

The jurisprudence is to the same effect in Canada: \textit{Calder v Attorney-General
(British Columbia)}\textsuperscript{97} \textsuperscript{[above, 5.1]. In \textit{Delgamuukw v British
Columbia} the unanimous British Columbia Court of Appeal, in considering both general and
executive extinguishment, agreed that the onus of proving extinguishment lay
upon the Crown, and cited Canadian Supreme Court decisions in support.\textsuperscript{98}

Decisions in the United States of America are to similar effect. In the
landmark decision \textit{United States v Sante Fe Pacific Railroad Co}\textsuperscript{99} Douglas J
of the United States Supreme Court declared, after reviewing both legislative
and executive extinguishment of native title:

\textit{E}xtinguishment cannot be lightly implied \ldots \textit{T}he rule of construction
recognised without exception for over a century has been that ‘doubtful expressions,
instead of being resolved in favour of the United States, are to be resolved in favour
of a weak and defenceless people, who are wards of the nation, and dependent
wholly upon its protection and good faith’.


\textsuperscript{96} [1921] 2 AC 399 at 410.

\textsuperscript{97} (1973) 34 DLR (3d) 145 at 208, 210 (SC(Can)) To like effect see: \textit{R v Horseman} (1990) 55 CCC (3d) 353 concerned an argument that legislation governing rights to hunt had extinguished the indigenous right to hunt, which was pleaded in defence of the charge of commission of an offence under the Wildlife Act 1980 (RSA). The court, by a 4-3 majority, rejected the defence, but considered that the onus of showing extinguishment of the right lay upon the Crown. Cory J, for the majority, stated that ‘the onus of proving either express or implicit extinguishment lies upon the Crown: see \textit{Simon v R . . . Calder v British Columbia (A-G)}’: (1990) 55 CCC (3d) 353 at 375.

In \textit{R v Sparrow} [1990] 1 SCR 1075 at 1099, where the Crown asserted extinguishment of a right to fish by fisheries legislation, Dickson CJC, for a unanimous court, cited Hall J’s assessment of the question of onus with approval, and declared that ‘the Crown had failed to discharge its burden of proving extinguishment’ (emphasis added).

\textsuperscript{98} (1993) 104 DLR (4th) 470 at 521–2 per MacFarlane JA (Taggart JA concurring); at 595 per Wallace JA; at 663, 673–4 per Lambert JA; at 753 per Hutcheon JA.

\textsuperscript{99} 314 US 339 at 354 (1941)
In *Lipan Apache Tribe v United States*, Davis J said:

Once established in fact, [Aboriginal title] endures until extinguished or abandoned . . . In the absence of a ‘clear and plain indication’ in the public records that the sovereign ‘intended to extinguish all of the [claimant’s] rights’ in their property, Indian [sic] title continues.

The court rejected the assertion of extinguishment because there was ‘insufficient proof of extinguishment’.

### 5.3 No suspension and no revival

The requirement of a clear and plain intention to extinguish, would dictate that the grant of a short-term interest does not extinguish, but merely suspends native title, irrespective of considerations of inconsistency. So declared Toohey J in *Wik Peoples v Queensland*. The justice envisaged two elements in the process, the first looking at inconsistency, and the second asking ‘whether native title rights are thereby truly extinguished or whether they are simply unenforceable’ during the term of the interest.

But the minority of the High Court in *Wik Peoples v Queensland* rejected the possibility of the suspension of native title. Brennan CJ’s judgment asserted that the grant of an estate by the Crown ‘establishes exhaustively the entire proprietary legal interests which may be enjoyed’ in the land. Upon alienation of an estate the land was brought within the regime of tenures and estates which do not ‘admit an interest which is not derived’ from the Crown. Brennan CJ considered that the established common law doctrine of tenures and estates must bar any continuation of native title after an estate had been granted. Brennan CJ’s analysis is founded on a determination to justify the result in terms of the doctrines of tenures and estates, which have never contemplated native title at common law and obviously do not provide for it.

The High Court in *Western Australia v Ward* effectively following Brennan CJ’s dissent in *Wik*, rejected the possibility of mere suspension of native title at common law, and did so without regard to the requirement of a clear and plain intention to extinguish. The question was one of inconsistency — if rights are ‘inconsistent, there will be extinguishment to the extent of inconsistency . . . Absent particular statutory provisions to the contrary, questions of suspension of one set of rights in favour of another do not arise’. The majority judgment pointed to ‘obvious difficulties in identifying satisfactory criteria for distinguishing between long-term and other transactions’. Rather than struggle with those difficulties and the demands of the presumption against extinguishment and the dictates of the requirement of a clear and plain intention, the justices preferred to find in favour of extinguishment.

The rejection of the concept of suspension of native title necessarily results in findings of complete extinguishment with respect to most, but not all leases, no matter how short-term.

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100 180 Ct Cl 487 at 492.
101 Quoted with approval in *Calder v Attorney-General (British Columbia)* (1973) 34 DLR (3d) 145 at 210.
102 (1996) 187 CLR 1 at 108; 141 ALR 129 at 170.
103 (1996) 187 CLR 1 at 91; 141 ALR 129.
5.4 Regulation

Regulation of native title needs be distinguished from extinguishment. ‘Conventional theory’ would dictate that legislation amounts to mere regulation where no clear and plain intention to extinguish native title is present: *Yanner v Eaton*. A clear and plain intention to extinguish native title is not ‘revealed by a law which merely regulates the enjoyment of native title or a regime of control that is consistent with the continued enjoyment of native title’. In *Mabo (No 2)* Brennan J relied upon *R v Sparrow* which distinguished between extensive legislative control of fishing rights and their extinguishment, and *United States v Sante Fe Pacific Railroad Co* which rejected a finding of extinguishment of native title in the circumstances of the creation of an Indian reservation under federal control.

But in recent decisions the High Court of Australia has focused on inconsistency of rights, rather than clear and plain intention in the determination of extinguishment. Accordingly if the legislative regime is ‘inconsistent’ with the existence of native title then extinguishment rather than regulation will be found. In *Western Australia v Ward* by laws under the Rights in Water and Irrigation act prohibited interference with flora and taking of fauna in order to protect the ‘water, grounds and works from trespass and injury’ in furtherance of the purposes of the act. Both the trial court and Full Federal Court concluded that the by laws could not signify an intention to extinguish native title rights to flora and fauna, but merely controlled their exercise. The majority judgment in *Western Australia v Ward* concluded that the by laws extinguished the native title rights to gather flora and hunt fauna. No regard was accorded the presumption against taking away private rights.

5.5 Crown reserve

Vesting of reserve or public lands, ‘in trust’ or otherwise, in public authorities for public purposes has generally been regarded as conferring only powers of control management and disposition, such ‘as may be necessary to enable the body to discharge its public functions effectively’: *Attorney General (Quebec) v Attorney General (Canada)*. Such a vesting has not been considered to entail any divesting of private property, being construed in accordance with ‘the policy which the Legislature has certainly always pursued of not taking private rights without compensation’: *Tunbridge Wells Corporation v Baird*.

The trial judge and all members of the full Federal Court in *Ward* held that the vesting of reserve lands for a public purpose in a public authority under the Land Act of Western Australia did not generally extinguish native title. Vesting was not inconsistent with native title and did not manifest a clear and
plain intention to extinguish native title. The presumption against the taking of private rights was given effect to. But the majority judgment of the High Court in *Western Australia v Ward* held that the vesting created a statutory trust, which transferred the legal estate in fee simple. No regard was accorded the requirement of a clear and plain intention to extinguish.

The reasons of the majority seem to demonstrate a presumption in favour of extinguishment, rather than a presumption against. The reasoning will result in the wholesale denial of native title on Crown reserves.

### 6 Conclusion

Australian law is preoccupied with indigenous traditional laws and customs. But the preoccupation is not directed to giving respect to Indigenous laws and customs, the empowerment of indigenous people or the recognition of indigenous rights, rather it is that of the colonial dispossessor and of the curator in the museum.

The preoccupation with indigenous traditional laws and customs has two particular aspects. Firstly, native title is considered to have a unique nature such as to justify the denial of the application of principles of equality and full respect. The result is the disregarding of the requirement of a clear and plain intention to extinguish native title and the imposition of the onus to show non extinguishment on the claimant group. Extinguishment of native title is accordingly found in a wide variety of circumstances. Furthermore there is no presumption of continuance of native title if established at the acquisition of sovereignty rather there is imposed the requirement to show substantial maintenance of acknowledgment of traditional laws and observance of traditional customs showing a connection to the land to the present.

Secondly, there is a refusal to recognise that an indigenous society, if it exists, would inevitably have a system and regime of traditional laws and customs. The result is the demand for excessive particularisation of traditional laws and customs which necessarily restricts the evolution of native title rights and effectively denies any comprehensive interest to claimants. There is in essence a refusal to recognise the collective nature of the relationship between indigenous people and their territory, accompanied by a voyeuristic obsession with traditional laws and customs. It entails the perpetuation of the colonial mentality of Australia’s past now resurrected in a patronising and paternalistic manner so as to disempower indigenous people and deny them rights.

The Australian preoccupation affords a startling contrast to the North American jurisprudence. That jurisprudence both seeks to provide equality and full respect and recognises that the collective nature of the society inevitably dictates the existence of a regime of traditional laws and customs. The result is the application of principles of extinguishment which are generally in accord with those imposed on other interests, and the focus of the fundamental inquiry is whether or not the territory is the traditional homeland.


111 (2002) 191 ALR 1 at [219], [235]–[244], [249] Callinan J (McHugh J agreeing) did not reach such conclusion, but then those Justices concluded that the mere creation of a reserve wholly extinguished native title [772]–[779].

See *Daniel v State Western Australia* [2003] FCA 666 (3 July 2003) at [665].
of the claimant society. The issue becomes whether or not the claimant society can establish use and occupation at the acquisition of sovereignty, whereupon a presumption of continuance arises. There is no demand for proof of continued acknowledgment of traditional laws and observance of traditional customs to the present. Claimants are not denied their traditional lands on account of integrating with contemporary society as was held in *De Rose Hill*. Nor are they recognised as having only a right to humpies but not houses as in *Daniel*. 