THEMES EMERGING FROM
THE HIGH COURT’S RECENT
NATIVE TITLE DECISIONS

LISA WRIGHT
JUNE 2003
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Published by the Commonwealth of Australia, National Native Title Tribunal.
Text on page 61 should read:

“4.13.2 Native title in tidal waters

The following rights, if claimed in tidal waters, are fundamentally inconsistent with common law public rights to navigate over and fish in those waters:

- an exclusive native title right to fish;

- a native title right to occupy, use and enjoy those waters to the exclusion of all others;
  or

- a native title right to possess those waters to the exclusion of all others.¹

Therefore, unless the NTA otherwise provides, these native title rights are extinguished.”

¹ Western Australia v Ward (2002) 191 ALR 1 at [388] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
THEMES EMERGING FROM THE HIGH COURT’S RECENT NATIVE TITLE DECISIONS

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13 JUNE 2003

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1 Introduction

1.1 Scope and purpose of this document

What follows is, primarily a synthesis of the main issues arising out of the majority decisions of the High Court in:

- Yanner v Eaton (1999) 201 CLR 351; (1999) 166 ALR 258;
- Western Australia v Ward (2002) 191 ALR 1;
- Wilson v Anderson (2002) 190 ALR 313;

It summarises rather than critiques these decisions. Wherever possible, the language of the judges is used.

Three broad themes that emerged from these judgements are addressed below, namely:

- the conceptualisation and definition of native title under the NTA;
- certain matters going to proof of native title; and
- the principles in relation to the extinguishment or suspension of native title.

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1 Please note that the decisions considered here address native title in the context of claimant applications brought by Aboriginal people. No offence is intended by the absence of a reference to Torres Strait Islanders. However, generally speaking, the findings of the High Court in these cases will apply equally to Torres Strait Islander people.

2 All references below are to the CLR (Commonwealth Law Reports) unless the case is not yet reported in that series, in which case references are to the Australian Law Reports (ALR). The development of the law in relation to native title prior to these cases is briefly sketched in Appendix 1.

3 For a critique of these decisions, see the Aboriginal & Torres Strait Islander Social Justice Commissioner’s Native Title Report 2002 available at http://www.hreoc.gov.au.

4 Note that there are many other issues relating to proof that are not addressed here. See, for example, Neate G, Proof of Native Title, Chapter 10 in ‘Commercial implications of Native Title’, Horrigan B, Young S, (eds) Federation Press 1997.
1.2 When will native title be recognised?

Proving whether or not native title currently exists in relation to a particular area of land and waters and, if so, to what extent, is a complex exercise that involves multiple steps. It is only at the end of this long process that it can be determined which of the rights and interests that the relevant Indigenous people possess under their traditional law and custom will be recognised as native title.

The steps outlined here are discussed in detail in Parts 2 to 4 below, where full citations for the propositions are given. However, even this brief summary indicates that resort to the legal process for recognition of native title that is set out in the NTA is unlikely to provide a satisfactory outcome for many Indigenous Australians or, indeed, many others involved in the native title process. Consequently, parties should consider whether, in their particular circumstances, there are any alternative methods of reaching accord that would be more appropriate than a native title determination.

1.2.1 The outcome of the decisions in brief

In order to determine whether or not native title continues to exist over a particular area of land or waters, the decisions indicate that the following matters must be addressed.

Completely extinguished

Firstly, it must be determined whether any act done with the authority of the new sovereign at any time since sovereignty was asserted was or is:

- wholly or completely inconsistent with the continued existence or exercise of any native title rights and interests; or

- confirmed or validated under the NTA and analogous state and territory native title legislation as an act that completely extinguishes all native title in relation to the area concerned.

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5 Note that the Preamble to the NTA has always acknowledged that ‘many Aboriginal peoples and Torres Strait Islanders, because they were dispossessed of their traditional lands, will be unable to assert native title rights and interests and that a special fund [the Indigenous Land Fund] needs to be established to assist them to acquire land.’

6 This is legislation passed in reliance upon s. 19, s. 22F, s. 23E and s 23I which deal with acts that are attributable to the state or territory (as defined in s 239). The legislative provisions of the
If this is the case, then a further inquiry must be made to determine whether or not the NTA or the state or territory analogue provides that:

- the extinguishment caused by the act should be disregarded; and/or
- there should be suspension rather than extinguishment of inconsistent native title rights and interests.

If this is not the case, then native title has been completely extinguished and the common law will not recognise native title in relation to the area concerned. No further inquiry as to the existence of rights and interests held under traditional law and custom is required for the purposes of making a determination of native title under the NTA. In practice, most claimant applications do not cover any area where native title is wholly extinguished.

**Partially extinguished**

Where it is not established that native title is completely extinguished, it will be necessary for those asserting native title to prove, among other things:

- the existence of a vital society that, since the time of the assertion of sovereignty over the area to the present, has had a system of traditional laws and traditional customs that constitutes a body of normative rules or a normative system;
- that this normative system has continued to operate without any substantial interruption from the time of the assertion of sovereignty by the British Crown over the area to the present;
- that the laws and customs that make up that system find their origin in the laws and customs observed and acknowledged by those who held native title to the area at the time of the assertion of sovereignty over the area;
- that the rights and interests they currently possess under that system and which they seek to have recognised as native title rights and interests also find their

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7 Various state and territory acts are analogous, but not always identical, to the provisions of the NTA. For this reason, they are referred to here as the state or territory analogue.

There is a substantial overlap between complete extinguishment by operation of the common law and by operation of the various statutory provisions. As noted below, determining what caused the extinguishment will be required in order to determine whether compensation is payable or not.
origin in the rights and interests held by the predecessors at the time of the assertion of sovereignty.

They must also show that the rights and interests they seek to have recognised as native title are rights and interests ‘in relation to land and waters’ and that the laws and customs that give rise to them are those traditional laws and traditional customs by which the claimants have a connection to their country.

Because native title is conceptualised in these judgements as a bundle of rights, each right in the bundle must usually be identified with a high degree of particularity. Further, the rights and interests must not be antithetical to the fundamental tenets of the common law and must also be capable of being protected by legal and equitable remedies. Finally, they must not have been extinguished. If they do not meet these criteria, then the common law will withdraw recognition of those rights as native title rights and interests. This will be so even though they have been proven to exist currently as a matter of fact. This is referred to as the withdrawal of common law recognition of native title.

Subject to one exception, individual native title rights will be extinguished whenever they are inconsistent with another non-native title right or interest that exists or existed at any time since the date on which sovereignty was asserted. Extinguishment will be to the extent of the inconsistency. The exception is that inconsistent native title rights will survive if the NTA and the state or territory analogous legislation provide for their suspension to the extent of any inconsistency. The NTA may also require that any extinguishment brought about by the creation of a ‘prior interest’ (as defined) must be disregarded for all purposes under the NTA (see s. 47, s. 47A and s. 47B).

In order to determine the extent to which native title is or was, at any time since the assertion of sovereignty, inconsistent with other non-native title rights, it is usually necessary to conduct an inquiry into all acts done at any time since sovereignty was
asserted over the area that involved the creation, grant or assertion of a non-native title right.\textsuperscript{8} This involves tracing the history of dealings with the area concerned.

Once all the rights in the non-native title bundle have also been clearly and specifically identified, a comparison between the two sets of rights must be made and the extent of the inconsistency between them ascertained i.e. the inconsistency of incidents test is applied. The native title rights found to be inconsistent with non-native title rights will then either be extinguished or suspended to the extent of the inconsistency.

2 Conceptualising and defining native title

2.1 The link between Mabo (No. 2) and the NTA

In \textit{Mabo (No 2)},\textsuperscript{9} it was decided that \textit{certain rights and interests} relating to land and \textit{possessed under the traditional laws and customs} of Indigenous Australians survived the Crown’s acquisition of sovereignty.

It was \textit{this} native title that was then ‘recognised, and protected’ in accordance with the NTA and which, thereafter, was not able to be extinguished contrary to the NTA.\textsuperscript{10}

Subject to what is said about change and adaptation at [2.10.5] below, only those rights and interests survived the change in sovereignty. Any new rights or interests that arise must find their roots in the legal order of the new sovereign power.\textsuperscript{11}

Therefore, the rights and interests dealt with by the NTA are those that:

- existed at sovereignty;
- survived the fundamental change in legal regime; and

\textsuperscript{8} The effect of the acquisition of sovereignty and the reception of the common law may also be relevant: see \textit{Commonwealth v Yarmirr} (2001 - 2002) 208 CLR 1 per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\textsuperscript{9} \textit{Mabo v Queensland (No. 2)} (1992) 175 CLR 1 at 61 per Brennan J.

\textsuperscript{10} \textit{Members of the Yorta Yorta Aboriginal Community v Victoria} (2002) 194 ALR 538 at [75] per Gleeson CJ, Gummow and Hayne JJ, emphasis added.

\textsuperscript{11} \textit{Members of the Yorta Yorta Aboriginal Community v Victoria} (2002) 194 ALR 538 at [55] per Gleeson CJ, Gummow and Hayne JJ.
now, by resort to the processes of the new legal order, can be enforced and protected. 12

These rights and interests must be possessed under a normative system that has had a substantially continuous existence and vitality since sovereignty was asserted over the area concerned: 13

[C]ontinuity in acknowledgment and observance of the normative rules in which the claimed rights and interests are said to find their foundations before sovereignty is essential because it is the normative quality of those rules which rendered the Crown’s radical title acquired at sovereignty subject to the rights and interests then existing and which now are identified as native title. 14

If there has been a substantial interruption in the operation of that system, then the rights and interests which owe their existence to that system will have ceased to exist. As a result:

[A]ny later attempt to revive adherence to the tenets of that former system cannot and will not reconstitute the traditional laws and customs out of which rights and interests must spring if they are to fall within the definition of native title. 15

2.2 Effect of acquisition of sovereignty

After sovereignty was acquired, the normative or law-making system that then existed (and which gave rise to native title) when sovereignty was acquired could not validly create any new rights, duties or interests i.e. there could be no parallel law-making system. Therefore, any new rights or interests created after that date ‘would not and will not be given effect by the legal order of the new sovereign’. 16

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12 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [75] and [77] per Gleeson CJ, Gummow and Hayne JJ.
13 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [46] and [47] per Gleeson CJ, Gummow and Hayne JJ.
14 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [88] per Gleeson CJ, Gummow and Hayne JJ.
15 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [47] per Gleeson CJ, Gummow and Hayne JJ.
2.3 Native title is a bundle of rights

Both the common law, by the application of the inconsistency of incidents test, and the NTA treat native title as a bundle of rights and provide for partial extinguishment.\(^{17}\) Note, however, that the bundle may, in some instances, amount to a right of exclusive possession.\(^{18}\)

Each right or interest in the bundle claimed as a native title right and interest can be extinguished by the lawful creation, assertion or grant of an inconsistent non-native title right or interest i.e. native title may be partially extinguished.\(^{19}\) Native title will be extinguished to the extent to which it is inconsistent with the non-native title right or interest.

No question of suspension of inconsistent native title rights and interests arises unless the NTA or the analogous state and territory legislation passed in accordance with the NTA provide that this is the case.\(^{20}\) If those Acts do so provide, usually by way of the application of the non-extinguishment principle found in s. 238, then native title will be suspended to the extent of any inconsistency. The inconsistency of incidents test is applied in order to determine the extent of the inconsistency.\(^{21}\)

This finding and the requirements of s. 225 in relation to the making of a determination that native title exists mean that, in most cases,\(^{22}\) the content and extent

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\(^{17}\) *Western Australia v Ward* (2002) 191 ALR 1 at [76] to [79], [82], [95], [190] to [192], [221], [258] to [260] and [422] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\(^{18}\) See *Western Australia v Ward* (2002) 191 ALR 1 at [88] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\(^{19}\) For example, unless the NTA otherwise provides, an exclusive native title right to control access to and the use of an area will be extinguished whenever a non-native title right to access and use the same area (e.g. by the grant of a non-exclusive pastoral lease) has been lawfully created.

\(^{20}\) Which it does in many circumstances through the application of the non-extinguishment principle found in s. 238.


\(^{22}\) Cases where it is unnecessary to identify the rights in each bundle are discussed at [4.2] below.
Themes emerging from the High Court’s recent native title decisions

of the rights and interests claimed must be exhaustively identified and listed, as must the non-native title rights:

Generally speaking, it will only be possible to determine the inconsistency said to have arisen between the rights of the native title holders and the third party grantee once the legal content of both sets of rights said to conflict has been established.23

Once the contents of each bundle of rights is identified, an ‘objective inquiry’ must be conducted to compare the claimed native title rights and interests with any non-native title rights and interests that do, or previously did, exist over the area concerned. Identifying whether or not there is any inconsistency between the two bundles of rights allows for a determination of the extent to which native title has either been extinguished or, if the NTA and the relevant state or territory analogue allows for this to be the case, suspended for the duration of the inconsistent non-native title rights and interests.

A failure to clearly and specifically identify the nature and content of each right in each bundle may ‘mask the fact that there is an unresolved question of extinguishment’ of native title.24 Further:

The more general the terms in which the findings are made as to the subsistence of native title, the more difficult the giving of specificity to findings of extinguishment, particularly where...there may be partial extinguishment.25

It should be noted that specific findings as to the nature and content of the native title right being asserted may facilitate a finding that the native title rights and interests in question have been regulated rather than extinguished.26

23 Western Australia v Ward (2002) 191 ALR 1 at [149] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
24 Western Australia v Ward (2002) 191 ALR 1 at [53] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
25 Western Australia v Ward (2002) 191 ALR 1 at [29] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
26 Western Australia v Ward (2002) 191 ALR 1 at [29] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
2.4 Common law concepts and native title

Native title is neither an institution of the common law nor a form of common law tenure.\textsuperscript{27} Using common law terms as the starting point to describe claimed native title rights and interests is ‘apt to mislead the inquiry’ under s. 223.\textsuperscript{28} This is because the use of common law terms imports concepts that owe their origin to the common law. For example:

To speak of ‘possession’ of the land, as distinct from possession to the exclusion of all others, invites attention to the common law content of the concept of possession and whatever notions of control over access might be thought to be attached to it, rather than to the relevant task, which is to identify how rights and interests possessed under traditional law and custom can properly find expression in common law terms.\textsuperscript{29}

Some rights and interests possessed under traditional laws and customs may be translated into (i.e. find expression in) language that is familiar to the common law. For example:

It is the rights under traditional law and custom to be asked permission and to ‘speak for country’ that are expressed in the common law as a right to possess, occupy, use and enjoy land to the exclusion of all others.\textsuperscript{30}

This is because these rights have as their content, under traditional law and custom, rights to control access to, and exploitation of, particular areas. This describes a ‘particular measure of control over access’ that intersects with the common law concept of a right to ‘possess, occupy, use and enjoy land to the exclusion of all others’.\textsuperscript{31}

\textsuperscript{28} Western Australia v Ward (2002) 191 ALR 1 at [94] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. On this point, see also McHugh J at [477] to [478].
\textsuperscript{29} Western Australia v Ward (2002) 191 ALR 1 at [89] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, emphasis added.
\textsuperscript{30} Western Australia v Ward (2002) 191 ALR 1 at [88] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, emphasis added.
\textsuperscript{31} Western Australia v Ward (2002) 191 ALR 1 at [89] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
Other terms familiar to the common law may be used to describe native title rights and interests but, apparently, only if the court is satisfied that the rights possessed under traditional law and custom are sufficiently congruent with the common law concept.

It might be very difficult to express the relationship between an Indigenous people and their country in terms of specified rights and interests but this is what is required by the NTA:

The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them.\(^{32}\)

### 2.5 The role of the common law

The role of the common law is to provide for recognition of native title rights and interests.\(^ {33}\) Recognition represents the ‘intersection’ of traditional laws and customs with the common law i.e. the intersection of two ‘radically different’ social and legal systems.\(^ {34}\)

The relevant intersection, concerning as it does rights and interests in land, is:

\[
\text{[A]}\text{n intersection of two sets of norms. That intersection is sometimes expressed by saying that the radical title of the Crown was ‘burdened’ by native title rights but…undue emphasis should not be given to this form of expression. Radical title is a useful tool of legal analysis but it is not to be given some controlling role.}\(^ {35}\)
\]
2.6 Not always analogous to fee simple

It is wrong to assume that ‘native title’ or ‘native title rights and interests’ are necessarily analogous to an estate in fee simple. In determining whether or not this is the case:

[I]t is essential to identify and compare two sets of rights: one deriving from traditional law and custom, the other deriving from the exercise of the new sovereign authority that came with settlement. 36

2.7 Possessory rights and native title

Without a right of possession, ‘it may greatly be doubted’ that there is any right to control access to land or make binding decisions about the use to which it is put. Where this is the case, it has been said that it would be preferable to ‘express the rights by reference to the activities that may be conducted, as of right, on or in relation to the land or waters’ covered by the application. 37

2.8 Property rights and native title

The rights and interests with which the NTA deals are not necessarily confined to rights that the common law would traditionally classify as property or interests in property.38 However, native title rights and interests may have ‘some or all of the features which a common lawyer might recognise as a species of property’ because they are rights and interests ‘in relation to land and waters’.39

2.9 Primacy of the NTA

When an application for a determination of native title is made under the NTA:

- it is to the terms of the NTA that primary regard must be had, and not the decisions in Mabo v Queensland (No. 2) (1992) 175 CLR 1 or Wik Peoples v

36 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [75] per Gleeson CJ, Gummow and Hayne JJ.
37 Western Australia v Ward (2002) 191 ALR 1 at [52] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
Queensland (1996) 187 CLR 1. In other words, the NTA has the principal and determinative role; what was said in Mabo (No 2) may be relevant when considering the meaning and effect of the NTA, particularly provisions that are ‘plainly based’ on what was said in that case, such as s. 223(1)(a) and (b).

That said, it is of the ‘very first importance’ to recognise two critical points:
- questions of extinguishment must be dealt with in accordance with the NTA; and
- applications made under the NTA are for rights that are defined in s. 223.

2.10 Definition of native title under the NTA

The NTA deals only with rights and interests that fall within the scope of the definition of ‘native title’ and ‘native title rights and interests’. These terms are ‘elaborately’ defined in s. 223 of the NTA.

The NTA ‘does not seek to create some new species of right or interest in relation to land or waters which it then calls native title’. It deals with rights and interests that

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40 Western Australia v Ward (2002) 191 ALR 1 at [16] and [25] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. At [570] and [596], Kirby J agreed generally but went on to emphasise that the provisions of the NTA should be given a construction that is consistent with the principles of fundamental human rights and that the requirement for specificity in describing rights and interests should not result in an undue narrowing of what is recognised as native title. See also Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [32], [70], [75] per Gleeson CJ, Gummow and Hayne JJ and Commonwealth v Yarmirr (2000-2001) 208 CLR 1 at [7] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

41 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [32] and [70] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.


45 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [75] to [76] per Gleeson CJ, Gummow and Hayne JJ.
Themes emerging from the High Court’s recent native title decisions

find their origin in pre-sovereignty traditional law and custom, not in either the NTA or the common law.46

2.10.1 Native title and native title rights and interests

These rights and interests may be possessed by a community, a group or an individual. They must be rights and interests ‘in relation to land or waters’ that have the following characteristics:

- they are possessed under the traditional laws currently acknowledged and the traditional customs currently observed by the relevant Indigenous peoples;47
- the Indigenous people who possess them ‘have a connection with’ the area in question ‘by those laws and customs’; and
- the rights and interests are recognised by the common law of Australia.48

The rights and interests in land and waters that were and are recognised by the new sovereign order include the rules of traditional law and custom dealing with the transmission of those interests.49

2.10.2 Traditional laws and customs

There is an ‘inextricable link’ between a society and its laws and customs. This is because:

Laws and customs do not exist in a vacuum. They are…socially derivative and non-autonomous…[I]t is axiomatic that “all laws are laws of a society or

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47 The fact that s. 13 allows for a determination of native title to be revoked or varied indicates that a determination of native title under s. 225 has an ‘indefinite character…[that] reflects the requirement for the continuing acknowledgment and observance of traditional laws and customs and continuing connection with land implicit in the definition of ‘native title’ in s 223(1) of the NTA’, even after a determination is made that native title exists at a particular time: Western Australia v Ward (2002) 191 ALR 1 at [32] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.


49 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [44] per Gleeson CJ, Gummow and Hayne JJ.
Themes emerging from the High Court’s recent native title decisions

In a native title context, the traditional laws and traditional customs under which the rights and interests are possessed must:

- arise out of and ‘in important respects, go to define a particular society’; 51
- derive from a body of norms or a normative system (i.e. a system of laws or rules) that has had a substantially continuous existence and vitality since sovereignty was asserted; 52
- originate in the body of law and custom acknowledged and observed by the claimant’s ancestors as at the time sovereignty was asserted; 53
- regulate and define the rights and interests that the native title holders have and can exercise in relation to the claim area. 54

The reference to a normative ‘system’ of traditional laws and customs should not be confined to a system of laws that have all the characteristics of a developed European body of written laws. 55

2.10.3 Inquiry into existence of vital continuing society

The society ‘defined’ by the laws and customs under which the native title rights and interests are said to be possessed must have:

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52 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [38], [47] and [83] per Gleeson CJ, Gummow and Hayne JJ.

53 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [37] to [38] per Gleeson CJ, Gummow and Hayne JJ.

54 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [87] per Gleeson CJ, Gummow and Hayne JJ.

continued to exist as a body united by its acknowledgement and observance of the laws and customs since sovereignty was asserted until the present;\(^{56}\) and acknowledgments and observed those laws and customs in a ‘substantially uninterrupted’ fashion since the date of the assertion of sovereignty to the time of the determination and thereafter.\(^{57}\)

The requirement for ‘substantial’ continuity recognises that it is ‘inevitable that the structures and practices of Indigenous societies, and their members, will have undergone great change since European settlement’.\(^{58}\)

Therefore, when making a determination of native title:

- the court may have to take account of alteration to, or development of, traditional law and custom that has occurred after sovereignty, ‘\textit{at least} those that are of a kind contemplated by that traditional law and custom, even where these are significant’.\(^{59}\) On this point, see [2.10.5] below;

- some change to, or adaptation of, \textit{traditional law and traditional custom} in the period between the Crown asserting sovereignty and the present will not necessarily be fatal to a native title claim;\(^{60}\)

- some interruption of \textit{enjoyment or exercise} of native title rights and interests in that period will not necessarily be fatal to a native title claim.\(^{61}\)

In \textit{Mabo (No. 2)}, on which s. 223(1)(a) and (b) are ‘plainly based’,\(^{62}\) it was said that:

\(^{56}\) Members of the Yorta Yorda Aboriginal Community v Victoria (2002) 194 ALR 538 at [49] and [89] per Gleeson CJ, Gummow and Hayne JJ.

\(^{57}\) Members of the Yorta Yorda Aboriginal Community v Victoria (2002) 194 ALR 538 at [50], [87] and [89] per Gleeson CJ, Gummow and Hayne JJ; Western Australia v Ward (2002) 191 ALR 1 at [32] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\(^{58}\) Members of the Yorta Yorda Aboriginal Community v Victoria (2002) 194 ALR 538 at [89] per Gleeson CJ, Gummow and Hayne JJ.


\(^{60}\) Members of the Yorta Yorda Aboriginal Community v Victoria (2002) 194 ALR 538 at [83] per Gleeson CJ, Gummow and Hayne JJ, emphasis in original.


the laws and customs of any people will change over time and that 'the rights and interests of the members of the people among themselves will change';\(^63\)

- the fact that there has been ‘some’ change to laws and customs since the sovereignty was acquired was ‘immaterial’ provided the general nature of the connection between claimants and the claim area remains;\(^64\)

- traditional law and custom is not frozen as at the moment of the acquisition of sovereignty.\(^65\)

Analysing the traditional laws and traditional customs of societies that have no well-developed written language using tools developed ‘in connection with very differently organised societies is fraught with evident difficulty’.\(^66\) But that difficult analytical task must be undertaken because:

- laws and customs and the society which acknowledges and observes them are inextricably interlinked; and

- the only rights and interests in relation to land or waters possessed under traditional law and custom that the new sovereign order recognised as native title were those that existed at the time of change in sovereignty.\(^67\)

If the society out of which the system of laws and customs arise ceases to exist as a group that acknowledges and observes those laws and customs, then those laws and customs ‘cease to have continued existence and vitality’.\(^68\)

### 2.10.4 Meaning of ‘traditional’

A ‘traditional’ law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice.

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\(^63\) *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 at 61 per Brennan J.

\(^64\) *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 at 70 per Brennan J.

\(^65\) *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 at 110 per Deane and Gaudron JJ.


\(^68\) *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 at [50] per Gleeson CJ, Gummow and Hayne JJ.
However, in the native title context, ‘traditional’ also carries with it other elements, namely:

- it is only normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty that are ‘traditional’ laws and customs;
- the reference to rights or interests in land or waters being possessed under traditional laws acknowledged and traditional customs observed by the Indigenous peoples concerned requires that the normative system under which the rights and interests are possessed is a system that has had a substantially continuous existence and vitality since sovereignty; and
- the use of ‘traditional’ reflects the fundamental nature of the native title rights and interests with which NTA deals as rights and interests rooted in pre-sovereignty traditional laws and customs.\(^69\)

Only the laws and customs found in the social structures of the relevant indigenous society as those structures existed at sovereignty are recognised as traditional laws and customs:

> It is not some later created rule of recognition rooted in the social structures of a society, even an indigenous society, if those structures were structures newly created after, or even because of, the change in sovereignty. So much necessarily follows as a consequence of the assertion of sovereignty and it finds reflection in the definition of native title and its reference to possession of rights and interests under traditional law and custom.\(^70\)

If the society that once acknowledged and observed the relevant laws and customs ceased to exist at some point in time but the descendants of those who made up that society later take them up again, then:

- the laws and customs acknowledged and observed by those descendants are not ‘traditional laws’ and ‘traditional customs’ as those expressions are used in the NTA; and, therefore,

\(^69\) *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 per Gleeson CJ, Gummow and Hayne JJ at [46] and [47] and [79].

any rights and interests in relation to land and water possessed under those laws and customs are not native title rights and interests. 71

2.10.5 Adaptation, change and continuity
In determining the significance of a particular change to, or an adaptation of, traditional law or custom, the key question is ‘whether the law and custom can still be seen to be traditional law and traditional custom’, in the sense set out above at [2.10.2] to [2.10.4].

If a change or adaptation is 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 Indigenous peoples when that expression is understood in the sense described above at [2.10.2] to [2.10.4], then it will not fall within the scope of the definition of native title found in s. 223(1). 72

Using a method of transport not known prior to European contact, such as a dinghy with an outboard motor, has been found to be an ‘evolved, or altered, form of traditional behaviour’. 73

2.11 Possessed under traditional law and custom: s 223(1)(a)
Paragraph 223(1)(a) presents a question of fact and requires both:
- the identification of the laws and customs said to be traditional laws and customs;
- the identification of the rights and interests in relation to land or waters which are possessed under those laws or customs.

The requirements of s. 223(1)(a) may be satisfied using the same evidence as is used to establish connection of the relevant Indigenous people with the claim area under s. 233(1)(b) because the connection that must be shown is a connection with the land or

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71 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [52] per Gleeson CJ, Gummow and Hayne JJ.
72 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [83] per Gleeson CJ, Gummow and Hayne JJ.
73 Yanner v Eaton (1999) CLR 351 at [68] per Gummow J.
waters ‘by those laws and customs’. Nevertheless, there are two separate inquiries required by the statutory definition:

- in s. 223(1)(a), for the rights and interests possessed under traditional laws and customs; and
- in s. 223(1)(b), for connection with land or waters by those laws and customs. 74

### 2.11.1 Effect of substantial interruption – no native title

If the claimants fail to satisfy the requirements of s. 223(1)(a) in the sense described in [2.10] above, then all native title will be found to have ceased to exist. 75

### 2.11.2 Sanctions not necessary

Native title rights or interests need not come with or be supported by ‘some enforceable means of excluding from its enjoyment those who are not its holders’. The reference to rights and interests possessed under traditional laws and customs invites attention to:

- how (presumably as a matter of traditional law) breach of the right and interest might be dealt with; and
- how (as a matter of custom) the right and interest is observed. 76

The second part of this inquiry ‘seems directed more to identifying practices that are regarded as socially acceptable, rather than...whether the practices were supported or enforced through a system...of sanctions by the relevant community’. 77

As a result, it should not be assumed that the only kinds of rights and interests referred to in s 223(1)(a) are rights and interests that are ‘supported by some communally organised and enforced system of sanctions’. 78

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74  *Western Australia v Ward* (2002) 191 ALR 1 at [18] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

75  *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 at [92] and [96] per Gleeson CJ, Gummow and Hayne JJ. Note that ‘it may be doubted that circumstances of this kind are at the core of the meaning to be given to extinguishment’: *Western Australia v Ward* (2002) 191 ALR 1 at [26] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

76  *Commonwealth v Yarmirr* (2001 - 2002) 208 CLR 1 at [16] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

77  *Commonwealth v Yarmirr* (2001 - 2002) 208 CLR 1 at [16] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

2.11.3 **Laws and customs must be norms**

There is no need to distinguish between what is a matter of traditional law and what is a matter of traditional custom because s. 223(1)(a) refers to traditional laws acknowledged and traditional customs observed:

Nonetheless, because the subject of consideration is rights or interests, the rules which together constitute the traditional laws acknowledged and traditional customs observed, and under which the rights or interests are said to be possessed, must be rules having normative content. Without that quality, there may be observable patterns of behaviour but not rights or interests in relation to land or waters.79

2.12 **Connection by traditional laws and customs: s. 223(1)(b)**

Native title must be understood as:

‘[A] perception of socially constituted fact’ as well as comprising ‘various assortments of artificially defined jural right’...[A]n important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land.80

Native title rights and interests find their origin in Aboriginal law and custom and reflect connection with the land.81 ‘[T]he connection which Aboriginal peoples have with “country” is essentially spiritual.’82

This connection or relationship is sometimes spoken of as having to care for, and being able to speak for, country.

‘Speaking for’ country is often bound up with the idea that others should ask for permission to access or use the country or its resources. But to focus only

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80 *Yanner v Eaton* (1999) 201 CLR 351 at [38] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.
81 *Yanner v Eaton* (1999) 201 CLR 351 at [37] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.
on the requirement that others seek permission for some activities would oversimplify the nature of the connection that the phrase seeks to capture.\(^{83}\)

### 2.12.1 Connection, not use or occupation

Paragraph 223(1)(b) requires consideration of whether, by the traditional laws and traditional customs under which native title rights and interests are said to be possessed by the Indigenous peoples concerned, those people have a ‘connection’ with the land or waters claimed.\(^{84}\) It is \textit{not} directed to how Aboriginal peoples use or occupy land or waters and ‘the absence of evidence of some recent use of the land or waters does not, of itself, require the conclusion that there can be no relevant connection’.\(^{85}\) However:

\[\text{T}he \text{ way in which land or waters are used may reveal something about the kind of connection that exists under traditional law or custom between Aboriginal peoples and the land or waters concerned.}\(^{86}\)

### 2.12.2 Native title ceases to exist if connection not established

Native title will be taken to have ceased to exist if those asserting that it exists cannot establish the present subsistence of the connection required by s. 223(1)(b).\(^{87}\)

### 2.12.3 Regulation and connection

Regulating the way in which native title holders use their traditional country does not sever the connection of the Aboriginal peoples concerned with the area:

\[\text{S}aying...\text{You may not hunt or fish without a permit...does not sever their connection with the lands concerned and does not deny the continued exercise}\]

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\(^{83}\) \textit{Western Australia v Ward} (2002) 191 ALR 1 at [14] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\(^{84}\) \textit{Western Australia v Ward} (2002) 191 ALR 1 at [64] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. See also \textit{Members of the Yorta Yorta Aboriginal Community v Victoria} (2002) 194 ALR 538 at [84] per Gleeson CJ, Gummow and Hayne JJ: The statutory definition is directed at possession of rights and interests, not their exercise, and to the existence of a relevant connection between the claimants and the area claimed.

\(^{85}\) \textit{Western Australia v Ward} (2002) 191 ALR 1 at [64] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, emphasis added. As a result of the way that this question was put to the High Court, it was not necessary for any view to be expressed on the nature of the connection that must be shown, including whether a spiritual connection alone would be sufficient.

\(^{86}\) \textit{Western Australia v Ward} (2002) 191 ALR 1 at [64] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, emphasis added.

\(^{87}\) \textit{Western Australia v Ward} (2002) 191 ALR 1 at [26] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. Note the comment that ‘it may be doubted that circumstances of this kind are at the core of the meaning to be given to extinguishment’. While their Honours were referring to a failure to satisfy s. 223(1)(a), their comment also appears to be relevant to a failure to satisfy s. 223(1)(b).
of the rights and interests that Aboriginal law and custom recognises them as possessing.\textsuperscript{88}

\subsection*{2.12.4 Cultural knowledge and connection}

Rights in relation to cultural knowledge that are possessed under traditional law and customs that are ‘manifested’ at particular sites may answer the requirement of connection with the claim area found in s. 223(1)(b).\textsuperscript{89} The ‘critical’ question is whether, ‘by those laws and customs’, there is ‘a connection with’ the land or waters in question.\textsuperscript{90} Therefore, what is required is the characterisation of the effect of the laws and customs relating to the protection of cultural knowledge as constituting a connection of the relevant Indigenous people to the area covered by the claimant application.\textsuperscript{91}

Incorporeal rights akin to a new species of intellectual property that involve, for example, restraining the use of existing photographs or video recordings of artwork or ceremonies, extend beyond denying or controlling access to native title land and present a ‘fatal difficulty’ in relation to showing connection to the land and waters by those laws and customs as required by s. 223(1)(b).\textsuperscript{92}

Therefore, while it may be possible to protect cultural knowledge under other laws (e.g. the laws in relation to confidential information, copyright, fiduciary duties and moral rights\textsuperscript{93}), a right of the character described above is not a right or interest that arises from the traditional laws and traditional customs \textit{by which} the claimants have a connection with the claimed land and waters. Therefore, it is not recognised as a

\textsuperscript{88} \textit{Yanner v Eaton} (1999) CLR 351 at [38] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.
\textsuperscript{89} \textit{Western Australia v Ward} (2002) 191 ALR 1 at [59] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
\textsuperscript{90} \textit{Western Australia v Ward} (2002) 191 ALR 1 at [19] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
\textsuperscript{91} \textit{Western Australia v Ward} (2002) 191 ALR 1 at [64] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
\textsuperscript{92} \textit{Western Australia v Ward} (2002) 191 ALR 1 at [60] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
\textsuperscript{93} Only Kirby J noted that the law of intellectual property was ‘ill-equipped to provide full protection’ of these rights and that one of the aims of the NTA was to ‘supplement the rights available under the general law’: \textit{Western Australia v Ward} (2002) 191 ALR 1 at [582].
native title right, despite the fact that ‘the connection which Aboriginal peoples have with “country” is essentially spiritual’.

2.13 Recognition by the common law: s. 223(1)(c)

Rights and interests that meet the requirements of s. 223(1)(a) and (b) must also be recognised by the common law before they ‘answer the description of native title as defined in the NTA’. The requirement in s. 223(1)(c) can be approached from two opposite poles:

- when will the common law not recognise such rights and interests; and
- when will the common law recognise them?

2.13.1 Withdrawn if inconsistent with common law unless the NTA otherwise provides

The fundamental question that must be asked is a question about inconsistency between ‘the asserted [native title] rights and the common law’.

Whether or not the common law will continue to recognise rights and interests possessed under traditional laws and customs depends upon:

[W]hether [or not] the common law is inconsistent with the continued existence of the rights and interests that owe their origin to Aboriginal law or custom.

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94 Western Australia v Ward (2002) 191 ALR 1 at [60] per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [60] to [61]. Kirby J expressly disagreed with this finding, criticising it on the basis that the rights claimed are rights ‘in relation to land and waters’ and do fall within the scope of s 223(1): ‘If …cultural knowledge, as exhibited in ceremony, performance, artistic creation and narrative, is inherently related to the land according to Aboriginal beliefs, it follows logically that the right to protect such knowledge is therefore related to the land for the purposes of the NTA’: see Western Australia v Ward (2002) 191 ALR 1 at [576] to [587].

95 Western Australia v Ward (2002) 191 ALR 1 at [14] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.


97 Commonwealth v Yarmirr (2001 - 2002) 208 CLR 1 at [40] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

98 Commonwealth v Yarmirr (2001 - 2002) 208 CLR 1 at [40] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

Answering this question requires considering:

- whether or not the common law and the rights and interests claimed as native title can co-exist; and
- if so, how they can co-exist.\textsuperscript{100}

If there is no inconsistency, then the common law will ‘recognise’ those rights and go on to determine how they can co-exist with the non-native title rights.\textsuperscript{101} It will then, ‘by the ordinary processes of law and equity’ give remedies i.e. provide protection for those rights.\textsuperscript{102}

However, if the answer to the first question is that the common law cannot co-exist with the native title, then ‘it was accepted in \textit{Mabo [No 2]} that the common law would prevail’.\textsuperscript{103}

There are three exceptions to this rule, all of which arise as a result of legislative intervention:

- the NTA provides that native title should be suspended, rather than extinguished, in certain circumstances by applying the non-extinguishment principle found in s. 238. Where this is the case, the common law will continue to recognise the suspended native title rights and interests in a determination of native title made under the NTA;\textsuperscript{104}
- either s. 47, s. 47A or s. 47B applies to a particular area, in which case any extinguishment brought about by the ‘creation’ of a ‘prior interest’ must be disregarded for all purposes under the NTA and the non-extinguishment principle also applies;
- the area concerned is or has been subject to an act that the NTA mandates extinguishes native title rights and interests, either completely or partially,

\textsuperscript{100} \textit{Commonwealth v Yarmirr} (2001 - 2002) 208 CLR 1 at [42] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\textsuperscript{101} \textit{Commonwealth v Yarmirr} (2001 - 2002) 208 CLR 1 at [42] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\textsuperscript{102} \textit{Commonwealth v Yarmirr} (2001 - 2002) 208 CLR 1 at [42] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\textsuperscript{103} \textit{Commonwealth v Yarmirr} (2001 - 2002) 208 CLR 1 at [42] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\textsuperscript{104} This principle applies to category C and D past and intermediate period acts and many future acts.
regardless of whether or not this would have been the case under the common law.  

This means that, unless the legislature intervenes, the common law will ‘recognise’ native title only where it can ‘continue to co-exist with the common law the settlers brought’. Where there is any inconsistency between the two, native title rights and interests will be extinguished to the extent of the inconsistency unless the legislature has intervened.

2.13.2 No importation of a body of pre-existing common law

It is wrong to read s. 223(1)(c) as either:

- importing into the NTA ‘some pre-existing body of the common law… defining the rights or interests known as native title.’ To do so would be ‘to treat native title as owing its origins to the common law when it does not’; or
- referring to common law elements for the establishment of native title.

This is because there is no such body of common law to which reference could be made. The elements for establishing native title are found in s. 223(1)(a) and (b), both of which give rise to questions of fact.

2.13.3 Recognition and the intersection of two systems

The requirement for recognition by the common law emphasises the fact that two ‘radically different social and legal systems’ intersected when sovereignty was asserted.

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105 The acts confirmed as extinguishing native title that are covered by Part 2, Division 2B of the NTA and the state or territory analogue may provide examples of this category but this has not been the case to date.
107 Western Australia v Ward (2002) 191 ALR 1 at [76] to [79], [82], [95], [190] to [192] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
108 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [76] per Gleeson CJ, Gummow and Hayne JJ.
Identifying the nature and location of that intersection requires careful attention to the content of traditional law and custom and to the way in which rights and interests existing under that regime find reflection in the statutory and common law.\textsuperscript{113}

### 2.13.4 Reasons for withdrawing recognition under s. 223(1)(c)

As noted above at [2.13.1], common law recognition will be withdrawn where rights and interests claimed as native title rights and interests are inconsistent with the common law, even when they have been proven to exist, as they must be for the purposes of s. 223(1)(a) and (b).

The three grounds for withdrawing common law recognition are:

- the traditional laws and customs of the group that give rise to those rights and interests are ‘antithetical to fundamental tenets of the common law’\textsuperscript{114} or ‘clash with the general objective of the common law of the preservation and protection of society as a whole’;\textsuperscript{115}
- there is no appropriate legal or equitable remedy available to protect and enforce those rights and interests;\textsuperscript{116}
- as a matter of law, the rights and interests have been extinguished.\textsuperscript{117} This will be so even though, but for that legal conclusion, on the facts native title would still subsist e.g. the \textit{fact} that the evidence in a particular case satisfied s. 223(1)(a) and (b) would not derogate from the \textit{legal} conclusion native title rights and interests

\textsuperscript{112} Members of the Yorta Yorta Aboriginal Community \textit{v} Victoria (2002) 194 ALR 538 at [77] per Gleeson CJ, Gummow and Hayne JJ.

\textsuperscript{113} Western Australia \textit{v} Ward (2002) 191 ALR 1 at [85] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\textsuperscript{114} Members of the Yorta Yorta Aboriginal Community \textit{v} Victoria (2002) 194 ALR 538 at [77] per Gleeson CJ, Gummow and Hayne JJ.


\textsuperscript{116} In \textit{Members of the Yorta Yorta Aboriginal Community \textit{v} Victoria} (2002) 194 ALR 538, after referring to these comments in \textit{Ward}, Gleeson CJ, Gummow and Hayne JJ said that native title rights and interests are, among other things, rights and interests that can now, ‘by resort to the processes of the new legal order’, be enforced \textit{and} protected. ‘It is those rights and interests which are ‘recognised’ in the common law.’ They appear to be saying that rights or interests that cannot be enforced and protected cannot be recognised under s 223(1)(c): \textit{Members of the Yorta Yorta Aboriginal Community \textit{v} Victoria} (2002) 194 ALR 538 at [77]. See also Callinan J at [176].

\textsuperscript{117} Western Australia \textit{v} Ward (2002) 191 ALR 1 at [26] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. See also \textit{Yorta Yorta} (2002) 194 ALR 538 at [77] per Gleeson CJ, Gummow and Hayne JJ and [110] per Gaudron and Kirby JJ.
will not be recognised by the common law because they have been extinguished, unless either s. 47, s. 47A or 47B applies to allow for statutory recognition of the extinguished native title rights and interests.118

The case law from the High Court does not yet provide examples of rights and interests falling into the first category and has not been developed in relation to the second.119 Therefore, in a case where recognition has been denied under s. 223(1)(c) by the High Court, this must have been because the rights in question were extinguished.120

3 Matters going to proof of native title

3.1 Start with question of fact

The relevant starting point in determining a claimant application is the question of fact posed by the NTA:

[W]hat 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 Indigenous peoples?121


119 On this point, a distinction has been drawn between cases where the claimants do not satisfy the requirements of s 223(1)(a) or (b) and those where the requisite connection is proven but the rights and interest in question have been extinguished by an inconsistent grant or act: Western Australia v Ward (2002) 191 ALR 1 at [26]. Note also that the single ground for dismissing the appeal in Yorta Yorta was that s. 223(1)(a) had not been satisfied i.e. the majority found that observance and acknowledgement of traditional laws and traditional customs had been substantially interrupted. Native title ceased to exist when that interruption occurred and so there was nothing for the common law to recognise under s. 223(1)(c): Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [77] per Gleeson, Gummow and Hayne and at [87], [92], [95] and [96] per Gleeson CJ, Gummow and Hayne JJ.

120 For example, in relation to exclusive rights in tidal waters in Western Australia v Ward (2002) 191 ALR 1 at [386] to [388] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, this conclusion is express. In Commonwealth v Yarmirr (2001 - 2002) 208 CLR 1 per Gleeson CJ, Gaudron, Gummow and Hayne JJ, this is the logical conclusion to be drawn given what was said in Ward at [21] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. This may have implications in relation to the application of s. 47, s. 47A and s. 47B, which mandate that, for all purposes under the NTA, such extinguishment is to be disregarded if those sections apply. Query, however, whether the inconsistent rights identified (i.e. common law public rights to fish etc. and the international law right of innocent passage) are interests that were ‘created’ (e.g. in the case of the public rights, by the reception of the common law) in the sense required by s. 47, s. 47A and s. 47B.

It has been noted that the ‘more general the terms in which the factual findings are made as to the subsistence of native title rights and interests, the more difficult the giving of specificity to findings of extinguishment, particularly where there may be partial extinguishment’. On partial extinguishment, see [2.3] above and Part 4 below. Arguably, the same is true in relation to circumstances where the NTA provides for the suspension of native title rights and interests.

3.2 Onus of proof

The applicants ‘plainly’ carry both an evidential onus of proof and the ultimate onus, or burden, of proof with respect to establishing that they are presently possessed of communal, group or individual rights and interests in relation to land or waters. Where extinguishment is in issue, the evidential burden may rest on the party who asserts extinguishment. However, strictly speaking, the ultimate burden of proof rests on the native title claimants to establish that extinguishment has not occurred. This is because they must ultimately show that native title rights and interests exist currently. The recent decisions of the High Court do not disturb these findings by the majority of the Full Bench of the Federal Court.

3.3 Vital continuing society

Laws and customs ‘do not exist in a vacuum’. They are ‘socially derivative and non-autonomous’. As a result, those seeking a determination that native title exists must show a society i.e. a body of persons united in and by its observance and acknowledgment of a body of laws and customs. Further, it must be demonstrated that observance and acknowledgment of traditional laws and customs by that society

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122 Western Australia v Ward (2002) 191 ALR 1 at [29] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
124 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [49] and [52] per Gleeson CJ, Gummow and Hayne JJ.
125 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [49] and [52] per Gleeson CJ, Gummow and Hayne JJ.
126 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [52] and [89] per Gleeson CJ, Gummow and Hayne JJ.
has continued substantially uninterrupted since the date of the assertion of sovereignty over the area concerned to the present day.\textsuperscript{127}

Therefore, the native title claimants must show that:

\begin{itemize}
  \item they have a system or body of laws and customs that has existed without substantial interruption since before the assertion of sovereignty to the present day;
  \item there has been substantially continuous observance or acknowledgment of the traditional laws and customs by the society as a group;
  \item since sovereignty was asserted, the society under whose laws and customs the native title rights and interests are said to be possessed has continued to exist as a body united by its acknowledgement and observance of the laws and customs.\textsuperscript{128}
\end{itemize}

Showing that knowledge of the traditional ways has survived may not be sufficient. Similarly, demonstrating that the content of law and custom has been passed from individual to individual in circumstances where the society that once acknowledged and observed those laws and customs has dispersed may not be sufficient.\textsuperscript{129}

When the society whose laws or customs existed at sovereignty ceases to exist, the rights and interests in land and waters to which these laws and customs gave rise also cease to exist.\textsuperscript{130}

The inquiry about continuity of acknowledgment and observance does not require consideration of why acknowledgment and observance stopped i.e. continuity of acknowledgment and observance is a condition for establishing native title. If it is not demonstrated that that condition was met, examining why that is so is important only to the extent that the presence or absence of

\begin{itemize}
  \item \textsuperscript{127} Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [49] to [53] and [89] per Gleeson CJ, Gummow and Hayne JJ.
  \item \textsuperscript{128} Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [49] to [53] [87] and [89] per Gleeson CJ, Gummow and Hayne JJ.
  \item \textsuperscript{129} Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [51] to [52] per Gleeson CJ, Gummow and Hayne JJ.
  \item \textsuperscript{130} Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [53] per Gleeson CJ, Gummow and Hayne JJ.
\end{itemize}
reasons might influence the fact-finder’s decision about whether there was such an interruption. 131

3.3.1 Substantial interruption – no revival

It is not sufficient to show that the content of the former laws and customs has been adopted by some new society, even where that new society is made up of the descendants of the society that existed when sovereignty was asserted. This is because:

[T]hose laws and customs will then owe their new life to that other, later, society and…the laws acknowledged by, and customs observed by, that later society…are not laws and customs which can now properly be described as being the existing laws and customs of the earlier society. The rights and interests in land to which the re-adopted laws and customs give rise are rights and interests which are not rooted in pre-sovereignty traditional law and custom but in the laws and customs of the new society. 132

Claimants must show that acknowledgment and observance of those laws and customs has continued substantially uninterrupted since sovereignty because:

Were that not so, the laws and customs acknowledged and observed now could not properly be described as the traditional laws and customs of the [Indigenous] peoples concerned…They would be a body of laws and customs originating in the common acceptance by or agreement of a new society of indigenous peoples to acknowledge and observe laws and customs of content similar to, perhaps even identical with, those of an earlier and different society. 133

3.3.2 Past and present are relevant

In proceedings where a determination that native title exists is sought, the court must inquire into:

- the society in which the laws and customs in question are said to operate;

131 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [90] per Gleeson CJ, Gummow and Hayne JJ.
the relationship between the laws and customs now acknowledged and observed, and those that were acknowledged and observed before the British Crown asserted sovereignty; and

whether the laws and customs proven can be said to be the laws and customs of a society whose laws and customs are properly described as traditional laws and customs: i.e. the body of laws and customs acknowledged and observed by the claimants’ ancestors at the time of the assertion of sovereignty: see above at [2.10] and [2.11].

3.3.3 Importance of the qualification: substantial continuity

Acknowledgment and observance must have continued ‘substantially’ uninterrupted since sovereignty was asserted. The qualification is important. It recognises that:

- proof of substantially continuous acknowledgment and observance of traditions that are oral traditions is very difficult;
- European settlement has had the most profound effects on Aboriginal societies; and
- it is, therefore, inevitable that the structures and practices of those societies, and their members, will have undergone great change since European settlement.

There may be exceptional cases where the laws or customs of the relevant society contemplated discontinuity of acknowledgement or observance, or absence or departure from land.

3.3.4 Knowledge v acknowledgment and observance

Demonstrating that some of the claim group have knowledge of the content of traditional laws and customs will not be enough if there is no society that has, substantially, continued to acknowledge and observe them from the date of the assertion of sovereignty to the present because, in those circumstances:

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134 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [53] and [87] per Gleeson CJ, Gummow and Hayne JJ. Account must also be taken of the fact that ss. 223(1) (a) and (b) are cast in the present tense. ‘The questions thus presented are about present possession of rights or interests and present connection of claimants with the land or waters. That is not to say, however, that the continuity of the chain of possession and the continuity of the connection is irrelevant’: Ibid at [85], emphasis in original.

135 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [89] per Gleeson CJ, Gummow and Hayne JJ.

136 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [174] per Callinan J.
It ceases to be useful, even meaningful, to speak of them as a body of laws and customs acknowledged and observed, or productive of existing rights or interests, whether in relation to land or waters or otherwise.\textsuperscript{137}

### 3.4 Inferences and importance of evidence led

It is likely that the claimants will invite the court to draw inferences from evidence led at trial about the content of traditional law and custom at times in the past, particularly before the date of the assertion of sovereignty. In these circumstances:

Much will...turn on what evidence is led to found the drawing of such an inference and that is affected by the provisions of the NTA.\textsuperscript{138}

#### 3.4.1 No ‘bright line’ test for changes or adaptations

In determining the significance of a particular change to, or an adaptation of, traditional law or custom, the key question is ‘whether the law and custom can still be seen to be traditional law and traditional custom’, in the sense summarised above at [2.10] and [2.11].

Difficult questions of fact and degree may emerge in deciding:

- what, if any, significance should be attached to the fact of change or adaptation; and
- what has changed or been adapted.\textsuperscript{139}

There is no single ‘bright line’ test\textsuperscript{140} for deciding:

- what inferences may be drawn or when they may be drawn where there has been change or adaptation; or
- what changes or adaptations are significant.\textsuperscript{141}

\textsuperscript{137} Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [50] per Gleeson CJ, Gummow and Hayne JJ.

\textsuperscript{138} Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [80] per Gleeson CJ, Gummow and Hayne JJ.

\textsuperscript{139} Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [82] per Gleeson CJ, Gummow and Hayne JJ.

\textsuperscript{140} That is, a test that draws a clear and unqualified distinction that separates those adaptations and changes that are acceptable and those that are not: see, for example, Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia (1999) 201 CLR 49; (1999) 168 ALR 123; (1999); Perre v Apand Pty Ltd (1999) 198 CLR 180; (1999) 164 ALR 606; Ebner v Official Trustee in Bankruptcy (2000) CLR 337; (2000) 177 ALR 644.
In considering the significance of changes or adaptations, effect must be given to the statutory language of the definition in s. 223(1) rather than to some reformulation of the provisions.  

3.5 Connection

Paragraph s 223(1)(b) is directed at whether, by the traditional laws acknowledged and the traditional customs observed by the Indigenous peoples concerned, they have a ‘connection’ with the land or waters. Whether there is a relevant connection depends upon:

- the content of traditional law and custom; and
- what is meant by ‘connection’ by those laws and customs.

Proof of this requires:

- the identification of the content of traditional laws and customs; and
- the characterisation of the effect of those laws and customs as constituting a connection of the relevant Indigenous people to the application area.

3.5.1 Use and occupation not necessarily relevant to connection

Proof of continued use of the application area is not necessarily required. ‘[T]he absence of evidence of some recent use of the land or waters does not, of itself, require the conclusion that there can be no relevant connection’. However:

[T]he way in which land or waters are used may, in some cases, reveal something about the kind of connection that exists under traditional law or custom between the [Indigenous] peoples and the land or waters concerned.
3.5.2 Spiritual connection

None of the majority judgments of the High Court to date have expressed a view on the nature of the connection that must be shown to exist, in particular on when a ‘spiritual connection’ alone (i.e. connection asserted without evidence of continuing use or physical presence) will suffice.\(^{147}\)

3.6 Interruption not expiry or abandonment.

It is misleading to describe the consequences of interruption in acknowledgment and observance of traditional laws and customs as ‘abandonment’. To do so might suggest ‘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’.\(^{148}\)

‘Expiry’ is a term ‘that may distract attention from the terms in which native title is defined. That is reason enough to conclude that its use is unhelpful for it is the words of the Native Title Act to which the inquiry must always return’.\(^{149}\)

3.7 Degree of difficulty may be high

Identifying a society that can be said to continue to acknowledge traditional laws and observe traditional customs will, in many cases, be very difficult.\(^{150}\) Further, demonstrating the content of pre-sovereignty laws and customs may be ‘especially difficult’ in cases where the laws or customs now said to be acknowledged and observed are laws and customs that have been adapted in response to the impact of European settlement.\(^{151}\)

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\(^{146}\) Western Australia v Ward (2002) 191 ALR 1 at [64] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\(^{147}\) Western Australia v Ward (2002) 191 ALR 1 at [64] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. Note, however, at [104], the comments made by Gaudron and Kirby JJ that s. 223(1)(b) ‘does not require that the connection be physical, much less continuing occupancy. Spiritual connection by laws acknowledged and customs observed falls comfortably within the words of s 223(1)(b)’.

\(^{148}\) Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [90] per Gleeson CJ, Gummow and Hayne JJ.

\(^{149}\) Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [91] per Gleeson CJ, Gummow and Hayne JJ.

\(^{150}\) Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [52] per Gleeson CJ, Gummow and Hayne JJ.

\(^{151}\) Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [82] per Gleeson CJ, Gummow and Hayne JJ.
However, while demonstrating the content of that traditional law and custom may very well present difficult problems of proof, the difficulty of the forensic task does not alter the requirements of the statutory provision.\textsuperscript{152}

And, while the difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is ‘evident’, this is what the NTA requires:

‘[T]he spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them’.\textsuperscript{153}

4 When recognition is withdrawn

4.1 Introduction

This part sets out the principles in relation to the extinguishment or suspension of native title rights and interests that emerge from recent High Court judgements. Some examples of the application of those principles in particular cases are given at 4.14 below.

Native title and native title rights and interests that meet the requirements of s. 223 will be recognised in a determination made under s. 225 of the NTA. As noted above at [2.13.4], where claimants are able to satisfy ss. 223(1)(a) and (b), recognition by the common law may still be withdrawn under s. 223(1)(c) for one of three reasons.

As there is no case law in relation to the first and second categories, this part deals only with the question of recognition being withdrawn under s. 223(1)(c) on the ground that native title rights and interests have been wholly or partially extinguished.

Extinguishment occurs where:

\textsuperscript{152} Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at [80] per Gleeson CJ, Gummow and Hayne JJ.

\textsuperscript{153} Western Australia v Ward (2002) 191 ALR 1 at [14] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
the application of the inconsistency of incidents test gives rise to a determination that inconsistent non-native title rights and interests exist (or existed) over the same area and, therefore, that native title is extinguished to the extent of the inconsistency; or

- the area is or was subject to an act that either the NTA or the state or territory analogue provide is an act that wholly or partially extinguishes native title (e.g. a category A past or intermediate period act or a previous exclusive possession act\(^{154}\)); and

- neither the NTA nor the state or territory analogues provide for suspension rather than extinguishment.

Note that if s. 47, s. 47A or s. 47B applies, then extinguishment brought about by the creation of a prior interest must be disregarded for all purposes under the NTA.

It is assumed here that the claimants have satisfied s. 223(1)(a) and (b). On this point, note that a distinction has been drawn between cases where the claimants do not satisfy the requirements of s. 223(1)(a) or (b) and those where native title has been extinguished by an inconsistent grant or act and is, therefore, not recognised under s. 223(1)(c). In relation to the former, ‘it may be doubted that circumstances of this kind are at the core of the meaning to be given to extinguishment’.\(^{155}\)

### 4.2 Not always necessary to first establish rights and interests exist

It is sometimes possible to determine issues of extinguishment without making any findings of fact under ss. 223(1)(a) and (b). For example, no such inquiry is required where it is clear that an act has been done over the area concerned that wholly extinguishes native title e.g. the act is a ‘previous exclusive possession act’ as defined in the NTA or the relevant state or territory analogue.\(^{156}\)

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\(^{154}\) See Part 2, Division 2 and 2B and Part 15 of the NTA and the state or territory analogue.

\(^{155}\) Western Australia v Ward (2002) 191 ALR 1 at [26] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\(^{156}\) Wilson v Anderson (2002) 190 ALR 313 at [36] to [37] per Gaudron, Gummow and Hayne JJ. As a result of s. 61A(2), which prohibits the making of a claim over an area subject to a previous exclusive possession act, most claimant applications exclude any area where this is the case. See Wilson v Anderson (2002) 190 ALR 313 at [31] and [38] per Gaudron, Gummow and Hayne JJ.
Where this is the case, the fact that Indigenous people still possess rights and interests in relation to land and waters under traditional laws and customs and can show the requisite connection is irrelevant.\textsuperscript{157} Common law recognition of those rights and interests as native title rights and interests is withdrawn, despite the fact that they continue to be possessed under traditional law and custom. Indeed, as noted earlier, questions of common law recognition under s. 223(1)(c) do not arise unless the claimants first prove that the rights and interests that they claim to possess under traditional law and traditional custom do, as a matter of fact, exist at the time at which the court is making the determination of native title for the purposes of ss. 223(1)(a) and (b): see Part 1 to Part 3 above.

4.3 Primacy of the NTA

Subsection 11(1), which is ‘a central provision of the NTA’\textsuperscript{158} and ‘perhaps, one of the most important provisions of the Act’,\textsuperscript{159} states that native title cannot be extinguished contrary to the NTA. Therefore, questions of extinguishment must be dealt with in accordance with the NTA. They ‘do not fall for consideration purely under the common law…divorced from statute’.\textsuperscript{160}

Even where native title was extinguished before the enactment of the NTA, a court making a determination of a native title under the NTA must consider the operation of that statute and the analogous state and territory laws upon any act said to have extinguished native title.\textsuperscript{161} This is of importance because there are circumstances in which the NTA either:


\textsuperscript{158} Western Australia v Ward (2002) 191 ALR 1 at [43] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\textsuperscript{159} Commonwealth v Yarmirr (2001 - 2002) 208 CLR 1 at [7] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\textsuperscript{160} Wilson v Anderson (2002) 190 ALR 313 at [50] per Gaudron, Gummow and Hayne JJ.

\textsuperscript{161} Wilson v Anderson (2002) 190 ALR 313 at [46] per Gaudron, Gummow and Hayne JJ.
provides for the statutory recognition of native title where the common law would not; \(^{162}\) or

partially or completely extinguishes native title where the common law would not. \(^{163}\)

### 4.3.1 Main provisions

The main provisions to which regard must be had are those found in:

- the confirmation of extinguishment by previous acts found in Part 2, Div 2B of the NTA and the state and territory analogues;
- the provisions in relation to the effect of the validation of past and intermediate period acts found in Part 2, Divisions 2 and 2A of the NTA and the state and territory analogues; \(^{164}\)
- Division 3 of Part 2, which deals with the effect of future acts on native title rights and interests of the NTA and the state and territory analogues;
- sections 47, 47A and 47B. These sections deal with, respectively, areas that were subject to either a pastoral lease held by the native title holders or certain other lands held by or on behalf of Aboriginal people or areas of, essentially, unallocated Crown land that meet the requirements of s. 47B(1) when the claimant application was made. Where they apply, extinguishment brought about by the creation of any ‘prior interest’ must be disregarded for all purposes under the NTA; and
- section 238, which explains the application of the non-extinguishment principle which is, essentially, that any inconsistent native title rights and interests are suspended for the duration of the inconsistent non-native title interest. This principle applies to category C and D past and intermediate period acts, areas where s. 47, 47A and s. 47B apply and many future acts. \(^{165}\)

Where the acts in question are ‘attributable’ to a state or territory (as defined in s. 239), the NTA makes provision for the states and territories to pass legislation to the

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\(^{162}\) By applying the non-extinguishment principle found in s. 238 or by requiring that extinguishment is to be disregarded: s. 47 to s. 47B.

\(^{163}\) The confirmation of extinguishment provisions found in Div 2B Pt 2 of the NTA may provide examples of the second category, although this has not been the case to date.

\(^{164}\) In relation to the overlap between these provisions and the confirmation of extinguishment provisions, see [4.6] below.

\(^{165}\) See s. 15(d), s. 22(d), s. 47(3)(b), s. 47A(3)(b), s. 47B(3)(b) and Part 2, Div 3 respectively.
same effect (subject to certain conditions being met): see, for example, s. 19, s. 22F, s. 22J, s. 23E, s. 23I i.e. the state or territory analogue to the NTA.

It may be necessary to have regard to all of these provisions in order to determine the effect of a particular act on native title. Regard to the inconsistency of incidents test is usually also necessary: see [2.3] above and [4.6.2] to [4.6.4] below and Appendix 2.

4.3.2 Meaning of ‘extinguish’ under the NTA

Section 237A defines ‘extinguish’ to mean:

[P]ermanently extinguish the native title. To avoid any doubt, this means that after the extinguishment the native title rights and interests cannot revive, even if the act that caused the extinguishment ceases to have effect.

4.4 Confirmation of extinguishment by previous acts

Division 2B of Part 2 of the NTA, which commenced on 30 September 1998, defines certain acts as either ‘previous exclusive possession acts’ (s. 23B) or ‘previous non-exclusive possession acts’ (s. 23F). 166

Section 23C ‘mandates’ that a ‘previous exclusive possession act’, as defined in s. 23B, completely extinguishes all native title in relation to area affected by that act. Section 23G ‘mandates’ that a ‘previous non-exclusive possession act’, as defined in s. 23F, partially extinguishes (or, in some cases, suspends) inconsistent native title rights and interests to the extent of the inconsistency. 167

Sections 23C and 23G only have effect in respect of ‘acts’ that are attributable to the Commonwealth (as defined in s. 239). However, as noted above, the NTA makes provision for states and territories to pass analogous legislation ‘to the same effect’ (provided certain conditions are met) as s. 23C and s. 23G in relation to previous

166 Western Australia v Ward (2002) 191 ALR 1 at [41] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
exclusive or non-exclusive possession acts attributable to that state or territory: see s. 23E and s. 23I.168

4.4.1 Previous exclusive possession act

In order to come within the definition of ‘previous exclusive possession act’, the act in question must satisfy four requirements.169

Firstly, the act must be ‘valid’. Assuming there is no other basis for invalidity, this may be because:

- it was valid when it was done e.g. it occurred before the commencement of the RDA or it was done after the RDA commenced but was not invalid because of the existence of native title;170 or
- it was a past or intermediate period act under either s. 228 or s. 232A of the NTA that has been validated by s. 14 or s. 22A of the NTA or the state or territory analogue.171

Secondly, the act must have been done at some time on or before 23 December 1996.172 Thirdly, it must have consisted of the ‘grant or vesting’ of ‘any’ of eight interests listed. An act may ‘answer the description of more than one “act” in the listed categories’.173 Note that some state or territory analogues have a narrower definition than that found in the NTA. Where the act in question is attributable (as defined in s. 239) to a state or territory, the analogous legislation is the relevant Act.

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169 See s. 23B and Wilson v Anderson (2002) 190 ALR 313 at [52] per Gaudron, Gummow and Hayne JJ, where three of these are identified. Note that some state and territory analogues define ‘previous exclusive possession act’ more narrowly than does the NTA. Regard should be had to the relevant state or territory analogous legislation in any particular case where the act in question is attributable to a state or a territory.

170 The findings in Western Australia v Ward (2002) 191 ALR 1 at [253] per Gleeson CJ, Gaudron, Gummow and Hayne JJ in relation to the effect of the vesting of a Crown reserve after the commencement of the RDA provides an example of the latter case i.e. the vesting of a reserve that was a national park was found to be valid at all times, despite the fact that it extinguished native title at common law. The RDA operated only to provide the affected native title holders with rights to compensation for the act. On the operation of the RDA, see 4.12 below.

171 See s. 23B(2)(a) and Wilson v Anderson (2002) 190 ALR 313 at [53] per Gaudron, Gummow and Hayne JJ and Western Australia v Ward (2002) 191 ALR 1 at [138] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. “Valid” is also defined in s. 253.

172 This is the date of the High Court’s decision in Wik Peoples v Queensland (1996) 187 CLR 1 at 185.

173 See Wilson v Anderson (2002) 190 ALR 313 at [54] per Gaudron, Gummow and Hayne JJ.
Lastly, it must not be an act that is expressly excluded from the definition of ‘previous exclusive possession act’: see ss. 23B(9) to (9C).\textsuperscript{174}

Putting the RDA and NTA to one side, as the grant or vesting of a freehold estate completely extinguishes native title at common law, the effect of the provisions of Div 2B on such a grant ‘coincides with the result reached by the common law’.\textsuperscript{175} This is, generally speaking, also true in relation to leases that confer a right of exclusive possession.

Note that any extinguishment brought about by the application of these provisions must be disregarded for all purposes under the NTA if the area in question is one to which either s. 47, s. 47A or s. 47B applies. The non-extinguishment principle will also apply.

4.4.2 Previous non-exclusive possession act

A ‘previous non-exclusive possession act’, as defined in s. 23F and state and territory analogues, is a valid (or validated: see 4.5 above) ‘non-exclusive’ agricultural lease and ‘non-exclusive’ pastoral lease\textsuperscript{176} that was granted:

- on or before 23 December 1996;\textsuperscript{177} or
- at some time after that date in exercise of either a legally enforceable right or a written agreement made in good faith on or before that date.\textsuperscript{178}

Note that any extinguishment brought about by the application of these provisions must be disregarded for all purposes under the NTA if the area in question is one to which either s. 47, s. 47A or s. 47B applies. The non-extinguishment principle will also apply.

\textsuperscript{174} In relation to s. 23B(9A) and s. 23B(9C), see Western Australia v Ward (2002) 191 ALR 1 at [204] and [205] and [258] to [260] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\textsuperscript{175} Wilson v Anderson (2002) 190 ALR 313 at [56] per Gaudron, Gummow and Hayne JJ.

\textsuperscript{176} As defined in s. 247B and s. 248B of the NTA.

\textsuperscript{177} This is the date of the High Court’s decision in Wik Peoples v Queensland (1996) 187 CLR 1.

\textsuperscript{178} See s. 23F(3) and the state or territory analogue.
4.5 Validation

The legislature has intervened twice to validate (make lawful and legally effective) acts that were otherwise invalid (unlawful and legally ineffective).\(^{179}\)

4.5.1 Past acts

Div 2 Pt 2 of the NTA deals with the validation of past acts and the effect of those acts on native title. A past act is, generally speaking, an act that took place before 1 January 1994\(^{180}\) and which was invalid to any extent but would have been valid to that extent if the native title did not exist when the act was done.\(^{181}\) In these circumstances, the NTA intervenes and ‘displaces the invalidity which otherwise flowed from the operation of the RDA.’\(^{182}\)

Generally speaking, questions of invalidity only arise as a result of the application of RDA:

[T]he chief and perhaps, the only way in which the existence of native title might have produced invalidity in a past act...is by attracting the overriding operation of the [RDA]...The definition of “past act” is the lynchpin for the provisions of the [NTA] which permit State laws enacted in the future to give full force and effect to earlier acts which purported to extinguish or impair native title but which were ineffective at the time when [they] were done.\(^{183}\)

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\(^{179}\) Ward (2002) 191 ALR 1 at [5] to [7] and [11] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; Pt 2, Div 2, 2A, 2AA (for land rights transfers in New South Wales) and ss. 228 to 232E and, for acts attributable to the state or territory, the analogous state or territory legislation passed in reliance upon ss. 19, 22F and 22J of the NTA.

\(^{180}\) Some past acts take place after the NTA commenced: see ss. 228(3) to (9). Further, an act consisting of the making, amendment or repeal of legislation that took place before 1 July 1993 is a past act if the other elements of the definition are fulfilled: see s. 228(2)(a)(i).

\(^{181}\) See s. 228(2)(b) and Western Australia v Ward (2002) 191 ALR 1 at [135] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\(^{182}\) Ward (2002) 191 ALR 1 at [99] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. See also s 7(3) NTA. Invalidity would have resulted by operation of the RDA and s 109 of the Commonwealth Constitution.

\(^{183}\) Western Australia v The Commonwealth (Native Title Act Case) (1995) 183 CLR 373 at [81] per Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ. Note that a finding of a fiduciary duty owed to native title holders or that the requirement in the Commonwealth Constitution that acquisitions of property by the Commonwealth must be on just terms could also give rise to invalidity but this has not been the case to date. In relation to the former, see Bodney v Westralia Airports Corporation Pty Ltd (2000) 109 FCR 178 at [46] to [67] per Lehan J and Mabo v Queensland (No (2) (1992) 175 CLR 1 at 199 to 205 per Toohey J and 112 and 113 per Deane and Gaudron JJ.
As noted above, past acts that are attributable (as defined in s. 239) to the Commonwealth are validated by s. 14(1). Section 15 sets out the effect of the validation of the past act in question on native title by classifying them as either category A, B, C or D past acts. These effects range from complete extinguishment to suspension of inconsistent native title rights and interests.

Section 19 of the NTA makes provision for states and territories to pass legislation to the same effect (provided certain conditions are met) in relation to past acts attributable to the state or territory. Past acts covered by these provisions are valid and are taken always to have been valid.

It is important to note that mere fact that an act affecting native title took place on or after the RDA commenced but before the NTA commenced does not mean that it is a ‘past act’. This is because the application of the RDA does not necessarily make these acts invalid. If it does not, then the act was ‘effective at common law to work extinguishment of native title’. The extent of the extinguishment is determined by applying the inconsistency of incidents test.

4.5.2 Intermediate period acts
Division 2A deals with intermediate period acts. There are, generally speaking, acts that:

- are not past acts;
- took place on or after 1 January 1994 but on or before 23 December 1996;
- relate, in whole or part, to an area that, at any time before the act in question was done:
  - was subject to a valid grant of freehold or a valid lease (other than a mining lease) or
  - had been used for the valid establishment or construction of a public work.

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186 This is the date of the High Court’s decision in Wik Peoples v Queensland (1996) 187 CLR 1.
187 Note the expanded definition of ‘public work’ in s. 251D.
would otherwise be invalid to any extent because ‘they fail to pass any of the future act tests in Div 3 of Pt 2 or for any other reason because of native title’.  

The general scheme of the Div 2A is similar in some ways to Div 2B Pt 2 of the NTA:

In particular, provision is made validating “intermediate period acts” attributable to the Commonwealth [s. 22A] and for State and Territory legislation to provide that such acts attributable to the State or Territory are validated [s. 22F].

There are four categories of intermediate period acts, each of which has a defined effect on native title, ranging from complete or partial extinguishment (category A and B intermediate period acts) to suspension of inconsistent native title rights and interests (category C and D intermediate period acts).

The question of the validity of an act that ‘affected’ native title done during the intermediate period is usually determined by applying the provisions of the NTA and the state or territory legislative analogue without reference to the RDA.

Note that any extinguishment brought about by the application of these provisions must be disregarded for all purposes under the NTA if the area in question is one to which either s. 47, s. 47A or s. 47B applies. The non-extinguishment principle will also apply.

### 4.6 Overlap between confirmation and validation provisions

Division 2B and the state or territory analogue provide ‘the analytical starting point’ when dealing with extinguishment under the NTA, largely because they resolve any overlap between the various ‘extinguishment regimes’ i.e. the provisions of the NTA.

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188 See s. 232A, Div 2A Pt 2 of the NTA and Western Australia v Ward (2002) 191 ALR 1 at [140] per Gaudron CJ, Gummow and Hayne JJ. Note that certain legislative acts are excluded from the definition of intermediate period act: s. 232A(2)(b) and the state or territory analogue.


190 See s. 232A to s. 232E and s. 22B and s. 22F and the state or territory analogue.

191 The RDA may be relevant to some acts done after the NTA commenced where these are past acts: see ss. 223(3) to (10) and the state or territory analogue.
and analogous state or territory legislation dealing with the confirmation of extinguishment by previous exclusive and non-exclusive possession acts found in Div 2B and the provisions dealing with the effect of the validation of past and intermediate acts found in Div 2 and Div 2A of the NTA and analogous state or territory legislation.192

This is because, in most cases, where an act can be categorised as both a past or intermediate period act and a previous exclusive or non-exclusive possession act, the effect of the act on native title is determined by reference to the provisions dealing with the effect of previous exclusive or non-exclusive possession acts: see s. 23C(3) and s. 23G(3) and their state and territory analogues.

One exception to this rule is that where a non-exclusive pastoral or non-exclusive agricultural lease that falls within the definition of ‘previous non-exclusive possession act’ also falls within the definition of a category A past act. In these cases, the effect of the act is that found in s. 15(1)(a) and not s. 23G(1)(b)(i) i.e. total, rather than partial extinguishment: see s. 23G(2).193

Despite the priority given Div 2B and its state or territory analogue in relation to the effect of a particular act on native title, the past and intermediate act provisions are relevant in many cases because they validate acts that would otherwise have been invalid to the extent that they ‘affected’194 native title had the NTA not intervened. Those provisions are also of great importance in relation to compensation: see [4.8] below.195

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192 Western Australia v Ward (2002) 191 ALR 1 at [10] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. This overlap arises because of the dates used to determine whether or not a particular act falls within a particular prescribed category e.g. subject to the exceptions noted above, the past act period runs from 31 October 1975 to 1 January 1994. The whole of this period is also covered by the confirmation of extinguishment provisions. The timeline at Appendix 3 provides a very simplistic illustration of this overlap.

193 Western Australia v Ward (2002) 191 ALR 1 at [418] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

194 As defined in s. 227 of the NTA.

195 The table at Appendix 2 addresses in a very simplistic way the provisions to which regard must be had in order to determine the effect of a particular act on native title.
4.6.1 Importance of state and territory analogues

If the act in question is attributable to a state or territory (as defined in s. 239), then it is to the state or territory analogous legislation that regard must be had, in the first instance, rather than the NTA. This is because:

- in some cases, the provisions of that legislation are at variance with the NTA;\textsuperscript{196} and
- the confirmation of extinguishment and the validation of past and intermediate period acts takes place under that legislation and not the NTA.

4.6.2 Acts that took place before the RDA commenced

When considering the effect of an act that took place before the RDA commenced on 31 October 1975, the order of consideration should be:

- firstly, consider whether or not Div 2B Pt 2 of the NTA (for acts attributable to the Commonwealth) or the analogous provisions of the relevant state or territory legislation (for acts attributable to a state or territory) apply;
- if the act in question is a previous exclusive possession act,\textsuperscript{197} then native title is completely extinguished;
- if the act in question is a ‘previous non-exclusive possession act, then it extinguishes native title to the extent of any inconsistency between that act and native title rights and interests. The inconsistency of incidents test is applied to determine the extent of the inconsistency;
- if none of these provisions apply, then the inconsistency of incidents test is applied in order to determine whether and to what extent native title rights and interests are extinguished;\textsuperscript{198}
- Finally, consider whether or not s. 47, 47A or s. 47B applies to any area.

It is not necessary to have regard to the validation of past or intermediate period act provisions because they do not apply to acts that took place before the RDA commenced.

\textsuperscript{196} For example, the Titles (Validation) and Native Title (Effect of Past Acts) Act 1995 (WA) uses the term ‘relevant act’ rather than ‘previous exclusive possession act’ in some cases. Further, ‘relevant act’ defines a narrower class of acts than does s. 23B.

\textsuperscript{197} As defined in s. 23B or the state or territory analogue.

\textsuperscript{198} Western Australia v Ward (2002) 191 ALR 1 at [139] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
4.6.3 Acts that took between RDA and 1 January 1994

If the act in question took place on or after the RDA commenced but before 1 January 1994, the order of consideration should be:

- firstly, consider whether or not validity is an issue. If it is, then determine whether or not the act in question is a past act. If so, it is valid. The category it falls into will determine its effect on native title, unless the confirmation of extinguishment provisions also apply. If it is a category C or D past act, the inconsistency of incidents will have to be applied. This is also true for some category B past acts,
- if it is not a past act, determine whether or not it is otherwise valid,
- if it is not valid, then it is not relevant,
- if the act is valid (which includes because it had been validated as a past act), then consider whether or not either Div 2B Pt 2 of the NTA (for acts attributable to the Commonwealth) or the analogous provisions of the relevant state or territory legislation (for acts attributable to a state or territory) also apply,
- if the act in question is a previous exclusive possession act, then native title is completely extinguished and this is ‘confirmed’ by the relevant legislation;
- if the act in question is a ‘previous non-exclusive possession act’, then it extinguishes native title to the extent of any inconsistency between that act and native title rights and interests. Again, this is ‘confirmed’ by the relevant legislation. The inconsistency of incidents test is applied to determine the extent of the inconsistency;
- if none of these provisions apply, then the inconsistency of incidents test is applied in order to determine whether and to what extent native title rights and interests have been extinguished,
- finally, consider whether or not s. 47, 47A or s. 47B apply to any area.

199 Or, in the case of legislative acts, before 1 July 1993: see s. 228(2)(a)(i).
200 Subject to the exception noted at [4.6] above.
201 Western Australia v Ward (2002) 191 ALR 1 at [418], [422] and [448].
203 Western Australia v Ward (2002) 191 ALR 1 at [78].
204 As defined in s. 23B or the state or territory analogue.
205 Western Australia v Ward (2002) 191 ALR 1 at [187] to [195] and [415] to [422] and [424].
206 Western Australia v Ward (2002) 191 ALR 1 at [139] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
4.6.4 Acts that took place on or after 1 January 1994

If the act in question took place on or after 1 January 1994, then it may be necessary to consider the application of Div 2 Pt 2 (effect of validation of past acts), Div 2A Pt 2 (validation of intermediate period acts) and Div 2B Pt 2 (effect of confirmation of extinguishment by previous exclusive and non-exclusive possession acts) and their state or territory analogues, along with Division 3 of Part 2 (the future act regime), along with the inconsistency of incidents test. Consideration should also be given to whether or not s. 47 to s. 47B apply.

4.7 No assumption under the NTA that a lease confers exclusive possession

For the purposes of the NTA, the expression ‘lease’ as defined in s. 242(1):

‘is wide enough to encompass…statutory interests which may not necessarily amount to a lease as understood by the common law…The definition in s 242 …demonstrates that the NTA postulates the existence of an interest which, although described as a “lease”, is not a lease at common law. 

Further, the scheme of Div 2B Pt 2 (the confirmation of extinguishment provisions) is premised upon the fact that a ‘lease’ as defined under the NTA may or may not confer a right of exclusive possession. Therefore, it is not to be presumed that a lease confers a right of exclusive possession.

In considering whether a lease confers the right of exclusive possession on the lessee the ‘proper order of inquiry is first to examine what are the rights granted [under the lease] and only then to classify the grant’.

207 Or, in the case of legislative acts, on or after 1 July 1993: see s. 228(2)(a)(i).
208 Essentially, ss. 228(2)(b) and (3) to (9).
209 Essentially, the future act regime displaces the protection afforded to native title rights and interest under the RDA and provides that a future act will be valid if the requirements of the relevant provisions of Pt 2, Div 3 of the NTA of the NTA are satisfied.
210 Wilson v Anderson (2002) 190 ALR 313 at [58] to [59] per Gaudron, Gummow and Hayne JJ.
211 Wilson v Anderson (2002) 190 ALR 313 at [59] per Gaudron, Gummow and Hayne JJ.
212 Western Australia v Ward (2002) 191 ALR 1 at [186] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
Note that Div 2B Part 2 of the NTA and the state and territory analogues confirm complete extinguishment of all native title rights and interests by leases granted for certain purposes (e.g. community, residential, or commercial) regardless of whether or not these types of lease confer a right of exclusive possession.\textsuperscript{213}

### 4.8 Compensation

Subsection 23J(1) provides for compensation in accordance with Div 5 Pt 2 of the NTA in respect of any extinguishment brought about by a previous exclusive or non-exclusive possession act.\textsuperscript{214} Therefore, those whose native title rights and interests are confirmed as being extinguished in whole or in part by previous exclusive or non-exclusive possession acts may be entitled to compensation for that extinguishment.

However, compensation will usually only be available in relation to acts that were validated under the NTA as past or intermediate period acts. This is because compensation entitlement is \textit{only to the extent (if any)} that the native title rights and interests were \textit{not} extinguished \textit{otherwise than under the NTA}:

The evident purpose of s 23J is to limit, so far as possible, the entitlement to compensation under s 23J, to cases where the “act” is invalid by reason of the \textit{Racial Discrimination Act 1975} (Cth)…and is subsequently validated by s 14 of the NTA [which deals with the validation of past acts] or [the analogous state or territory provision].\textsuperscript{215}

As noted above, compensation for the validation of an intermediate period acts which also fall within the definition of a previous exclusive or non-exclusive possession act will also be caught by s 23J.

Compensation may also be payable in relation to a previous exclusive or non-exclusive possession act that is not a past or intermediate period act. This will be the case where the act was ‘confirmed’ as extinguishing native title, either completely or

\textsuperscript{213} See s 23B(2)(c) and s 246, s 219, s 249A, s 249C and Schedule 1.
\textsuperscript{214} This section ‘demonstrates the point that questions of extinguishment and the degree thereof do not fall for consideration purely under the common law and divorced from statute’: \textit{Wilson v Anderson} (2002) 190 ALR 313 at [50] per Gaudron, Gummow and Hayne JJ.
\textsuperscript{215} \textit{Wilson v Anderson} (2002) 190 ALR 313 at [51] per Gaudron, Gummow and Hayne JJ.
Themes emerging from the High Court’s recent native title decisions

partially, under Division 2B or state or territory analogue but would not have had that effect at common law i.e. where 'statutory [confirmation of] extinguishment exceeds the extinguishment that would have occurred at common law' by virtue of the application of the inconsistency of incidents test.216

The fact that ‘a different result’ may be reached under Div 2B of Pt 2 of the NTA or the state or territory analogue emphasises the point that ‘it is the statutory criteria provided for by those provisions which are to be applied when determining issues of extinguishment’.217

Again, it must be emphasised that if the act in question is attributable to a state or territory (as defined in s. 239), then regard should be had to the state or territory analogue to the NTA in the first instance.

Compensation may also be payable as a result of the application of the RDA: see [4.12] below.

4.9 Extinguishment and suspension

4.9.1 Relevance of inconsistency

As noted above at [2.3], native title is, at common law, a bundle of rights and may be wholly or partially extinguished.218 Where any or all of the rights in the bundle have been extinguished, the common law will refuse to recognise that right i.e. withdraw recognition of it.

The ‘criterion for the withdrawal’ of recognition219 is that it would be inconsistent with the common law to recognise native title.220 When determining this,221

216  Wilson v Anderson (2002) 190 ALR 313 at [51] per Gaudron, Gummow and Hayne JJ.
217  Wilson v Anderson (2002) 190 ALR 313 at [51] per Gaudron, Gummow and Hayne JJ.
218  Western Australia v Ward (2002) 191 ALR 1 at [76], [82], [95], [190] to [192] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
219  Western Australia v Ward (2002) 191 ALR 1 at [77] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
220  Commonwealth v Yarrimirr (2001 - 2002) 208 CLR 1 at [76].
[T]he ultimate question is whether, by the steps that were taken, the Crown created in others, or asserted, rights in relation to the land that were inconsistent with native title rights and interests over the land.222

The ‘bare fact’ that there is a statutory authority for the executive to deal with land and waters in a way which would, if such a dealing happened, create rights inconsistent with the continued existence of native title rights is not sufficient, of itself, to extinguish native title.223

Further, the mere fact that non-native title rights or powers have been created, asserted or exercised does not automatically indicate that there is inconsistency. There may be circumstances where there is no inconsistency in the relevant sense at all224 or the native title rights may have been regulated rather than extinguished – see [4.11.5] below.

Even where there is inconsistency, native title:

- may only be partially extinguished i.e. to the extent of any inconsistency with other rights or interests in the area concerned; or

- may be suspended to the extent that it is inconsistent (i.e. completely or partly) with other rights and interest by operation of the NTA and the state or territory analogue.

The notion of inconsistency is, therefore, often central to resolving the question of whether native title has been extinguished or suspended and, if so, to what extent.225


223 Western Australia v Ward (2002) 191 ALR 1 at [151] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

224 Western Australia v Ward (2002) 191 ALR 1 at [26] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

225 Western Australia v Ward (2002) 191 ALR 1 at [82] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. Where the legislature has intervened to mandate that the doing of a prescribed act completely extinguishes native title (for example, a previous exclusive possession act), then the question of inconsistency will only be relevant if this exceeds the extinguishment that would have occurred under the common law. However, this will only be relevant in relation to a compensation application.
For example, an inquiry into the extent of any inconsistency between native title and non-native title rights must be conducted in cases where:

- the non-native title rights and interests in question only partially extinguish native title rights and interests i.e. native title rights and interests are extinguished *only to the extent* that they are *inconsistent* with any non-native title rights and interests;\(^\text{226}\) or

- the NTA provides that inconsistent native title rights and interests are *not* extinguished but, rather, are *suspended only to the extent of any inconsistency* with any non-native title rights and interests.\(^\text{227}\)

As noted at [2.3] above, it will usually only be possible to determine the extent of an inconsistency between native title and non-native title rights and interests once the legal content of both sets of rights said to conflict have been established.\(^\text{228}\) This is subject to the comments made above at 4.2 in relation to the occasions when it may not be necessary to conduct an inquiry to establish the former set of rights.

### 4.9.2 No degrees of inconsistency and no suspension at common law

There are no degrees of inconsistency of rights:\(^\text{229}\)

> Two rights are inconsistent or they are not. If they are inconsistent, there will be extinguishment to the extent of the inconsistency [unless the NTA provides for the native title rights and interests to be suspended to the extent of the inconsistency]; if they are not, there will not be extinguishment.

Further:

\(^{226}\) For example, the grant of a non-exclusive pastoral lease as defined in s. 248B which is a non-exclusive possession act as defined in s. 23F to which s. 23G(1)(b)(i) applies or the grant of a mining lease under the *Mining Act 1978* (WA): *Western Australia v Ward* (2002) 191 ALR 1 at [187] to [194], [419] to [425] and [296], [308], [309] and [340] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\(^{227}\) That is, where the non-extinguishment principle found in s. 238 applies. See, for example, *Western Australia v Ward* (2002) 191 ALR 1 at [418] and [423] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\(^{228}\) *Western Australia v Ward* (2002) 191 ALR 1 at [149] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, emphasis added.

\(^{229}\) *Western Australia v Ward* (2002) 191 ALR 1 at [82] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
Absent particular statutory provisions [essentially, the provisions of the NTA, state and territory analogues and the RDA230] to the contrary, questions of suspension of one set of rights [e.g. native title] in favour of another do not arise.231

Both s. 23G(1)(b)(ii) of the NTA and state and territory statutory analogues refer to ‘suspension’ of inconsistent native title rights and interests. However:

[T]his statutory outcome is postulated upon an inconsistent grant of rights and interests which, apart from the NTA…would not extinguish the native title rights and interests.232

Therefore, if the application of the inconsistency of incidents tests results in the identification of inconsistency between the pastoral lessee’s rights and the native title rights and interests, the latter are extinguished to the extent of any inconsistency unless the NTA or state or territory analogue otherwise provides.

For example, a non-exclusive pastoral lease that was a category D past act attracts the state or territory analogue to s. 23G(1)(b)(ii). While it was on foot, inconsistent native title rights would be suspended rather than extinguished.233 When the lease ceased to exist, the suspended native title rights would again have full force and effect, provided there was no intervening act that extinguished the suspended native title rights: s. 238.

4.9.3 Relevance of use and activities

Evidence of activities done on a particular area or how the area has been used is relevant to an inquiry into inconsistency but only to the extent that:

[I]t focuses attention upon the right pursuant to which the land is used. Any particular use of land is lawful or not lawful. If lawful, the question is what is

230 See 4.14 for a brief summary of the effect of the RDA.
231 Western Australia v Ward (2002) 191 ALR 1 at [82] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
232 Western Australia v Ward (2002) 191 ALR 1 at [82] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
233 Western Australia v Ward (2002) 191 ALR 1 at [418] and [423] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
the right which the user has. If it is not lawful, the use is not relevant [in the context of a determining inconsistency with native title].\textsuperscript{234}

Use of the land may suggest or demonstrate that inconsistent rights have been created or asserted. However, the ‘basic inquiry’ is about inconsistency of rights, not inconsistency of use. Further, it is usually necessary to examine inconsistency by reference to the particular native title right and interest asserted.\textsuperscript{235} For occasions when it is not, see [4.2] above.

4.9.4 Regulation v extinguishment

Statute may regulate the exercise of the native title right without abrogating it.\textsuperscript{236} Regulating the way in which native title rights and interests may be exercised:

- is not inconsistent with their continued existence; and

- presupposes that those rights exists.\textsuperscript{237}

However, it may be difficult to discern when regulation shades into prohibition, giving rise to inconsistency.\textsuperscript{238}

4.10 Extinguishment must be ‘clearly established’

The extinguishment of native title rights and interests must, ‘by conventional theory, be clearly established’ and ‘rights and interests are not to be held to have been abrogated by statute, except where the intention to do so is plainly expressed’.\textsuperscript{239}

\textsuperscript{234}Western Australia v Ward (2002) 191 ALR 1 at [78] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
\textsuperscript{235}Western Australia v Ward (2002) 191 ALR 1 at [215] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
\textsuperscript{236}Western Australia v Ward (2002) 191 ALR 1 at [26] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
\textsuperscript{237}Yanner v Eaton (1999) 201 CLR 351 at [37] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.
\textsuperscript{238}Yanner v Eaton (1999) 201 CLR 351 at [37] per Gleeson CJ, Gaudron, Kirby and Hayne JJ. For an example of prohibition leading to extinguishment, see example, s. 23 of the Wildlife Conservation Act 1950 (WA) prohibits the taking of fauna in nature reserves and wildlife sanctuaries without any exemption for Aboriginal people. This was found to ‘clearly and plainly’ extinguish any native title right to take fauna in a nature reserve or wildlife sanctuary that was created before the commencement of the RDA. The act of creating such reserves after the commencement of the RDA was not valid and, therefore, the right to take fauna was unaffected: Western Australia v Ward (2000) 99 FCR 316; (2000) 170 ALR 159 at [504] per Beaumont and von Doussa JJ.
In relation to the NTA, there are many occasions on which the intention to extinguish is ‘plainly expressed’. For example:

- the effect of the validation of category A and some category B past and intermediate period acts set out in ss. 15(1) and (2) and ss. 22B(a) to (b) and the state and territory analogues; and

- the effect of the confirmation of extinguishment by previous exclusive and non-exclusive possession acts found in s. 23C and s. 23G and their state and territory analogues.

In cases where there must be an inquiry into the effect of a particular act on native title, a ‘clear and plain intention’ to extinguish native title must be demonstrated. However, that expression ‘must not be misunderstood’. In the context of considering the effect on native title of the passing of legislation or rights and interests created pursuant to it, speaking of intention will ‘seldom assist’: The question is not what the legislature meant but what the statute under consideration means i.e. it is a question of statutory interpretation. The following are both irrelevant to this inquiry:

- the subjective thought processes of those whose act is alleged to have extinguished native title;

- whether or not, at the time when the act alleged to extinguish native title was done, the existence of native title was present to the minds of those whose act is alleged to have extinguished native title.

240 Western Australia v The Commonwealth (Native Title Act Case) (1995) 183 CLR 373 at 423 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.
241 Western Australia v Ward (2002) 191 ALR 1 at [78] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
4.11 Concept of operational inconsistency has limited utility

As noted above, whether native title rights are inconsistent with non-native title rights created, granted or asserted over the area concerned requires comparison between the legal nature and incidents of the right lawfully created, granted or asserted and the native title right asserted i.e. the application of the inconsistency of incidents test. For this reason the term ‘operational inconsistency’ is ‘useful, if at all, only by way of analogy’. In any case, the analogy ‘cannot be carried too far’.

The term operational inconsistency was not used in passages in the judgments in Wik of Gaudron J and Gummow J…Generally, it will only be possible to determine the inconsistency said to have arisen between the rights of the native title holders and the third party grantee [such as a lessee holding a non-exclusive pastoral lease] once the legal content of both sets of rights said to conflict has been established…

[Those]…rights…may be incapable of identification in law without the performance of a further act or the taking of some further step beyond that otherwise said to constitute the grant.245

Once the rights of the third party have been identified, the two bundles of rights are compared. Any inconsistent native title rights are either extinguished or suspended. Other native title rights survive.

The fact that native title rights may not be capable of being exercised over a particular area or at a particular time is not necessarily an indication that there is any inconsistency, even where there may be a spatial or temporal conflict between the exercise of particular rights:

[T]he erection by a pastoral lease holder of some shed…on the land may prevent native title holders gathering certain foods in that place [or] the use of land for mining purposes may prevent the exercise of native title rights and

244 Western Australia v Ward (2002) 191 ALR 1 at [468.5] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, emphasis added.
245 Western Australia v Ward (2002) 191 ALR 1 at [149] to [150] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
interests on some parts...of the leased area. That is not to say, however, that
the grant of a mining lease is necessarily inconsistent with all native title.246

4.12 Effect of the RDA: invalid and validated or
always valid?

It is now accepted that native title cannot be treated differently from other forms of
title simply because it has different characteristics from those other forms of title and
derives from a different source.247 In the cases to date, it has been found that s. 10(1)
was the ‘appropriate’ provision of the RDA.248 That subsection is directed at
circumstances where, by reason of a law of the Commonwealth, a state or a territory:

- a fundamental human right or freedom (e.g. the right to be free from arbitrary
  interference with legal rights) is enjoyed by some but not by others and the
distinction is based upon race, colour or national or ethnic origin; or

- one group enjoys those rights to a more limited extent than another and the
distinction is based upon race, colour or national or ethnic origin.249

In determining whether or not s. 10 of the RDA would have invalidated an act done
with or under statutory authority250 after the RDA commenced (but, in most cases,
before the NTA commenced) had the NTA not intervened, three results are possible.

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246 Western Australia v Ward (2002) 191 ALR 1 at [308] per Gleeson CJ, Gaudron, Gummow and
Hayne JJ, emphasis added. In this regard, note that the effect of lawful activities done after the
1998 amendments to the NTA commenced under valid instruments, such as a lease or a licence that
was granted at any time before the amendments commenced, is dealt with under s. 44H. Lawful
activities done after 23 December 1996 over areas subject to valid non-exclusive pastoral or non-
exclusive agricultural leases granted on or before 23 December 1996 are dealt with in s. 23GC of
the NTA. In both cases, the doing of those activities prevails over native title but does not
extinguish it. These provisions are yet to be judicially considered.

247 Western Australia v Ward (2002) 191 ALR 1 at [122] per Gleeson CJ, Gaudron, Gummow and
Hayne JJ.

248 Western Australia v Ward (2002) 191 ALR 1 at [103] per Gleeson CJ, Gaudron, Gummow and
Hayne JJ. At [127] to [133] of the joint judgement, it was found that s. 10 of the RDA continues to
speak in respect of territory laws.

249 Western Australia v Ward (2002) 191 ALR 1 at [103], [105], [127] to [133] per Gleeson CJ,
Gaudron, Gummow and Hayne JJ.

250 For example, the grant of a pastoral lease or the creation of a reserve in accordance with the
relevant legislation.
4.12.1  **Scenario one: always valid and no discrimination**

If the law in question is expressed in ‘general terms’ and ‘forbids [or removes] the enjoyment of a human right or fundamental freedom’ in such a way that ‘the burden falls upon all racial groups equally’, there is ‘no discrimination’. Therefore, s 10(1) is not attracted and the law in question was always valid, as were any acts done under its authority.\(^{251}\)

If scenario one applies, then the act in question cannot, by definition, be a past act because it was not invalid to any extent because of the existence of native title at the time the act was done: s 228. It is only if the act in question falls within the scope of scenario three that invalidity is an issue.

4.12.2  **Scenario two: always valid but discriminatory treatment**

If the law in question merely omits to make enjoyment of the rights in question universal e.g. ‘a state law…provides for the extinguishment of land titles but provides for compensation only in respect of non-native title’.\(^{252}\) In these circumstances, the state law is valid, as is any act done under its authority that extinguished the ‘land titles’.

If scenario two applies, then the act in question cannot, by definition, be a past act because it was not invalid to any extent because of the existence of native title at the time the act was done: s 228. It is only if the act in question falls within the scope of scenario three that invalidity is an issue.

\(^{251}\) An acquisition under s 18 of the *Public Works Act 1902* (WA), pursuant to which the ‘estate and interest of every person’ in the area concerned was deemed to have been converted into a compensation claim, falls into this category because the ‘Public Works Act provided no different treatment of native title rights and interests from the treatment of other rights and interests’: *Ward* (2002) 191 ALR 1, [278] per Glessoon CJ, Gaudron, Gummow and Hayne JJ. See also the finding at [316] to [321], [342] in relation to the grant of mining or general purpose leases under the *Mining Act 1978* (WA). This was subject to the native title holders having an entitlement to compensation as ‘owners’ or ‘occupiers’ as those terms are defined in the state legislation.

\(^{252}\) *Western Australia v Ward* (2002) 191 ALR 1 at [108]. For an example of the application of this scenario, see the findings at [253] in relation to the vesting of certain Crown reserves under the *Land Act 1933* (WA). The judges found that the act of vesting was valid and the empowering legislation was fully operative but s. 10 of the RDA gave the affected native title holders a compensation entitlement equivalent to that available to non-native title holders.
However, the RDA will confer the same rights on those whose native title was extinguished as the state law does on those who held non-native title rights to the area in question.\textsuperscript{253}

\textbf{4.12.3 Scenario three: invalid but validated}

If the purpose or effect of the law in question is that it allows for the ‘uncompensated destruction’ of native title rights and interests while leaving other titles intact,\textsuperscript{254} then only the native title holders enjoyment of a human right or fundamental freedom has been infringed. In these circumstances, the RDA confers the same ‘immunity from legislative interference’ with the relevant human right on those whose native title was extinguished as that enjoyed by other members of the community.\textsuperscript{255}

Had the legislature not intervened to validate past acts, this would have resulted in the law under which the grant was made being rendered inoperative to the extent that it was inconsistent with s. 10. Any act done under the authority of that law would, therefore, have been invalid had the NTA not intervened to validate those acts.\textsuperscript{256} It is only in these circumstances that the past act provisions are attracted, bringing with it the possibility that the non-extinguishment principle will apply.\textsuperscript{257}

Note also that if the act is a future act (including an intermediate period act), then its validity is determined by the application of the NTA future act regime found in Div 3, Pt 2 and state and territory analogues and not the RDA.

\textbf{4.13 Examples of the application of the principles}

What follows is a brief summary of application of the principles set out above. It is not comprehensive and should be read in conjunction with the cases and the relevant

\textsuperscript{253} Any compensation entitlement must be determined under the NTA provisions dealing with compensation: see s. 45 and \textit{Western Australia v Ward} (2002) 191 ALR 1 at [108] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\textsuperscript{254} \textit{Western Australia v Ward} (2002) 191 ALR 1 at [108] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.


\textsuperscript{257} \textit{Western Australia v Ward} (2002) 191 ALR 1 at [418] to [422] and [222]. Examples of the third category are the grant of a non-exclusive pastoral lease or the creation of a reserve under the \textit{Land Act 1933} (WA) over an area where the native title right to control use and access existed at the time.
statutory provisions. Note that the question of the effect of any particular act on native title may, in other states and territories, depend on the interpretation of different legislative provisions and so lead to a different result.

In all cases, it is assumed that there are no other grounds (aside from the existence of native title at the time the act in question was done) upon which the non-native title interest in question would be invalid.

4.13.1 Native title offshore

There is a fundamental inconsistency between a native title right to possession, occupation, use and enjoyment to the exclusion of all others and the common law public rights of navigation and fishing, as well as the right of innocent passage at international law. Therefore, unless the NTA otherwise provides, the inconsistent native title rights are extinguished.258

The two sets of rights cannot stand together and it is not sufficient to attempt to reconcile them by providing that exercise of the native title rights and interests is to be subject to the other public and international rights.259

At its root, the inconsistency lies not just in the competing claims to control who may enter the area but in the expression of that control by the sovereign authority in a way that is antithetical to the continued existence of the asserted exclusive rights.260

There is no necessary inconsistency between the acquisition of sovereignty offshore and the continued existence of other native title rights and interests offshore.261


260 Commonwealth v Yarmirr (2001 - 2002) 208 CLR 1 at [100] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

261 Commonwealth v Yarmirr (2001 - 2002) 208 CLR 1 at [61] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
4.13.2 Native title in tidal waters

The following native title rights, if claimed in tidal waters, are fundamentally inconsistent with public rights of navigation over and to fish in tidal waters:

- an exclusive right to fish;
- an exclusive right to occupy, use and enjoy those waters to the exclusion of all others; or
- an exclusive right to possess those waters to the exclusion of all others.\(^{262}\)

Therefore, unless the NTA otherwise provides, these native title rights are extinguished.

4.13.3 Non-exclusive pastoral leases

Valid or validated pastoral leases granted in Western Australia\(^{263}\) and the Northern Territory on or before 23 December 1996 are ‘non-exclusive pastoral leases’ as defined in s. 248B and are, therefore, ‘previous non-exclusive possession acts’ as defined under the relevant provisions of the Titles (Validation) and Native Title (Effect of Past Acts) Act 1995 (WA) and the Validation (Native Title) Act 1994 (NT), the state and territory analogues to s. 23F of the NTA.\(^{264}\) These leases do not confer a right of exclusive possession.

The grant of a ‘non-exclusive’ pastoral lease is not necessarily inconsistent with the continued existence of all native title rights and interests.\(^{265}\) However, the grant is inconsistent with a native title right to control:

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\(^{262}\) Western Australia v Ward (2002) 191 ALR 1 at [388] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\(^{263}\) Other than a special lease that is a ‘pastoral lease’ as defined in s. 248 that was granted under s. 116 of the Land Act 1933 (WA). This is an ‘exclusive pastoral lease’ as defined in s. 248A because it confers a right of exclusive possession: Western Australia v Ward (2002) 191 ALR 1 at [355] to [357] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.


\(^{265}\) Western Australia v Ward (2002) 191 ALR 1 at [193] and [417] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. The only exception would be where the lease in question was also a category A past act, in which case the effect of validation would be total extinguishment: see this case at [418] and s. 23G(2).
Themes emerging from the High Court’s recent native title decisions

- access to the land;
- the use made of the land.\(^\text{266}\)

In order to determine whether there is any further inconsistency, the rights in each bundle (i.e. the native title party and the pastoral lessee respectively) must be identified.\(^\text{267}\) Apart from the rights noted above, ‘many other native title rights to use the land the subject of the pastoral leases probably continued unaffected’.\(^\text{268}\) However, the pastoral lessee’s rights and interests prevail over any native title rights and interests that survived the grant of the lease: the state or territory analogue to s. 23G(1)(a).\(^\text{269}\)

The inconsistent native title rights are extinguished as a result of the grant of the pastoral lease unless the NTA provides for their suspension e.g. where the grant of the lease in question is a category D past act

Any extinguishment comes about as a result of the application of the inconsistency of incidents test and is merely confirmed under the provisions of the relevant state or territory analogue to s. 23G(1)(b)(i) of the NTA.\(^\text{270}\)

**Pre-RDA grant**

Where the lease in question was granted before the RDA commenced, it was valid when granted and the past and intermediate period act provisions have no application. However, the provisions dealing with the confirmation of extinguishment by previous non-exclusive possession acts are relevant.

**Post-RDA grant**

\(^\text{266}\) Western Australia v Ward (2002) 191 ALR 1 at [192], [422], [468.10] and [468.26] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. A native title right to burn country might be inconsistent with the pastoralist’s rights.

\(^\text{267}\) Western Australia v Ward (2002) 191 ALR 1 at [149] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\(^\text{268}\) Western Australia v Ward (2002) 191 ALR 1 at [194] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\(^\text{269}\) Western Australia v Ward (2002) 191 ALR 1 at [424] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\(^\text{270}\) Western Australia v Ward (2002) 191 ALR 1 at [192] and [422] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

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If the lease was granted on or after the RDA commenced and the inconsistent native title rights and interests identified above had not already been extinguished by an earlier act:

- if the lease was on foot on 1 January 1994, it would be a category A past act, which is an act that completely extinguishes all native title rights and interests. If s. 47, s. 47A or s. 47B of the NTA apply to the area concerned, then all prior extinguishment (including as a result of a category A past act) must be disregarded for all purposes under the NTA and the non-extinguishment principle will apply;

- if it was not on foot on 1 January 1994, then it would be a category D past act and the non-extinguishment principle will apply: see the state or territory analogue to Div 2 Pt 2 NTA. 271

**Effect of inclusion of a reservation in favour of Aboriginal people**

The reservations in favour of Aboriginal people to which the pastoral leases in question were subject did not define or confine the rights that native title holders could exercise in relation to the lease area. The grant of the lease does not give the pastoralist the right to exclude native title holders from the land. Such reservations are directed at giving rights of access for other Aboriginal people272 (although, of course, native title holders are also entitled to the benefit of the reservation). However, the lessees rights prevail: state and territory analogues to s. 23G(1)(a).

The absence of a reservation in favour of Aboriginal people is not necessarily fatal to the survival of native title.274

**4.13.4 Exclusive pastoral lease**

A lease for grazing purposes issued under s. 116 of the *Land Act 1933* (WA) is an exclusive pastoral lease as defined in s. 248A i.e. it is a lease that confers a right of exclusive possession.

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271 Western Australia v Ward (2002) 191 ALR 1 at [418] and [422] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
272 Western Australia v Ward (2002) 191 ALR 1 see [184] to [187] and [417] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
274 Western Australia v Ward (2002) 191 ALR 1 at [414] and [415] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
It can be distinguished from the non-exclusive pastoral leases considered at [4.13.3] because it is a less precarious interest and some of the purposes for which a lease under s. 116 could be granted (e.g. tanneries, factories, sawmills, warehouses) indicated that the grant of a lease under s. 116 gave the lessee a right to exclusive possession. As a result of these factors, this is an exclusive pastoral lease.

If it was granted before the RDA commenced, it was valid when granted. It would completely extinguish any native title that existed when it was granted. If it was still on foot on 23 December 1996, its extinguishing effect would be confirmed under the previous exclusive possession act provisions of the state analogue to s. 23C of the NTA. Usually, suspension will only occur if:

- s. 47, s. 47A or s. 47B apply to the area in question, in which case all extinguishment of native title brought about by the creation of any prior interest (as defined in the NTA), including the grant of the lease, must be disregarded and the non-extinguishment principle applies; or

- it was granted after the RDA commenced but was not on foot on 23 December 1996. This is because s. 12I(1)(b) of the Titles (Validation) and Native Title (Effect of Past Acts) Act 1995 (WA), the Western Australian analogue to s. 23B, requires that any such lease must be in force on that date in order to be a previous exclusive possession act. However, suspension will only be the result if the lease in question was granted on or after the RDA commenced and before 1 January 1994 but was not on foot at that date. If these conditions are met, then the grant was a category D past act, which is an act to which the non-extinguishment provisions apply.

Where the lease in question was granted on or after 1 January 1994, the provisions dealing with the effect of validation of past and intermediate period acts and the doing of valid future acts would have to be considered if the inconsistent native title rights and interests had not already been extinguished by the time of the grant of the lease.

275 Western Australia v Ward (2002) 191 ALR 1 at [355] to [357] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

276 Western Australia v Ward (2002) 191 ALR 1 at [357] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
A perpetual pastoral lease granted under s. 23 of the Western Lands Act 1901 (NSW) is an exclusive pastoral lease, the grant of which extinguishes all native title unless the NTA or the state analogue otherwise provides. This would give rise to issues similar to those raised above. For example, does the non-extinguishment principle apply to the grant in question?

4.13.5 Minerals and petroleum

Any native title right to minerals and petroleum that may have existed in Western Australia was extinguished by the provisions of the WA regime that vested property in those resources in the Crown. The vesting of property in minerals in the Crown under these legislative regimes was not like the vesting of property in the fauna in the Crown under the legislation considered in Yanner v Eaton (1999) 201 CLR 351:

The vesting of property in minerals was no mere fiction expressing the importance of the power to preserve and exploit these resources [as was found in Yanner] …Vesting of property and [sic] minerals was the conversion of the radical title to land which was taken at sovereignty to full dominion over the substances in question no matter whether the substances were on or under alienated or unalienated land [i.e. it vested full beneficial ownership of the minerals and petroleum in the Crown.]

4.13.6 Mining and general purpose leases in WA

The grant of a mining lease or a general purpose lease under the Mining Act 1978 (WA) is not necessarily inconsistent with the continued existence of all native title rights and interests. However, such a grant will extinguish any native title rights

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277 Wilson v Anderson (2002) 190 ALR 313 at [122] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, applying s. 248A, s. 23B, s. 23C and s. 23E of the NTA and the analogous state provisions.


279 Western Australia v Ward (2002) 191 ALR 1 at [384] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

280 Western Australia v Ward (2002) 191 ALR 1 at [296], [308] and [340] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
and interests that are inconsistent with the lessee’s rights unless the state analogue or the NTA otherwise provide.\textsuperscript{281}

The grant of a mining or general purpose lease under the Western Australian legislation is inconsistent with a native title right to control:

- access to the land;
- the use made of the land.\textsuperscript{282}

In order to determine whether there is any further inconsistency, the rights in each bundle (i.e. the native title party and the lessee respectively) must be identified. Note that the use of the land for mining purposes may prevent the exercise of some native title rights over parts or even the whole of the lease but this does not necessarily lead to inconsistency between the two sets of rights.\textsuperscript{283}

\textit{Post- RDA, pre 1 January 1994 grant: scenario one or two applies}

If the lease was granted on or after the commencement of the RDA but before 1 January 1994, then either scenario one or two applies. The effect of this finding is that:

- the grant was \textit{not} invalid to any extent because of the existence of native title;
- the grant cannot, therefore, be a category C past act because, by definition, such an act must be invalid to some extent because of the existence of native title;
- the non-extinguishment principle does not apply to the grant. Therefore, inconsistent rights will be permanently extinguished rather than suspended for the duration of the lease. If either s. 47, s. 47A or s. 47B of the NTA applies to the

\textsuperscript{281} \textit{Western Australia v Ward} (2002) 191 ALR 1 at [341] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. A case where the NTA otherwise provides is where the grant of the mining lease is a future act. The non-extinguishment principle applies to such a grant: 24MD(3).

\textsuperscript{282} \textit{Western Australia v Ward} (2002) 191 ALR 1 at [309] and [341] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\textsuperscript{283} \textit{Western Australia v Ward} (2002) 191 ALR 1 at [149], [308] and [341] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
area concerned, then all prior extinguishment must be disregarded and the non-extinguishment principle applies.\textsuperscript{284}

The affected native title holders have either:

\begin{itemize}
\item a right to compensation that arises under the WA \textit{Mining Act}; or, if this is not the case
\item a complementary right that arises by operation of s. 10(1) of the RDA.\textsuperscript{285}
\end{itemize}

\textit{Granted on or after 1 January 1994}

Where the lease was granted on or after 1 January 1994 and the inconsistent native title rights and interests identified above existed at the time of the grant, then (generally speaking) the non-extinguishment principle will apply either because the grant was:

\begin{itemize}
\item an impermissible future act under the old NTA that has been validated as a category C intermediate period act;
\item it was done pursuant to the provisions of a registered indigenous land use or validated under such a registered agreement (unless it is an invalid intermediate period act, which cannot be validated under an ILUA): s. 24EB(3) or s. 24EBA(4);
\item it is otherwise a valid future act: s. 24MD(3).
\end{itemize}

\textbf{4.13.7 Creation of reserves under WA legislation}

The designation of an area as a reserve under Western Australian legislation did not, without more, create any right in the public or any section of the public that extinguished native title rights and interests.\textsuperscript{286}

\textsuperscript{284} \textit{Western Australia v Ward} (2002) 191 ALR 1 at [321] and [342] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\textsuperscript{285} \textit{Western Australia v Ward} (2002) 191 ALR 1 at [321] and [342] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. This must be dealt with under the NTA: see s. 45.

\textsuperscript{286} \textit{Western Australia v Ward} (2002) 191 ALR 1 at [221] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
The act of creating the reserve is not necessarily inconsistent with the native title holders continuing to use the land in whatever way they had, according to their law and custom, been entitled to use it before it was reserved.\textsuperscript{287}

However, the creation of a reserve for a public purpose is inconsistent with any native title right to control access to and use of the area concerned and, unless the NTA and the state analogue otherwise provide, the act of creating the reserve extinguishes that right.

\textit{Post-RDA creation: scenario three applies}

If a reserve was created on or after the commencement of the RDA but before 1 January 1994 and the native title right to control access to and use of the area was not already extinguished at the time of the creation of the reserve, then the act of creating it will be a category D past act to which the non-extinguishment principle applies.\textsuperscript{288}

The validity and the effect of any validation on native title of the creation of a reserve on or after 1 January 1994 over an area where the native title right to control access to and use of the area concerned existed at the time would have to be determined by applying the past and intermediate period act provisions and future act provisions of the NTA and the state analogue.

\textbf{4.13.8 Vesting of reserve land under WA legislation}

The vesting of a reserve under s. 33 of the \textit{Land Act 1933} (WA) (the \textit{Land Act}) creates a public trust and vests the legal estate in fee simple.\textsuperscript{289} If the reserve was vested under s. 33 before the commencement of the RDA, then:

- all native title is extinguished unless the NTA and the state analogue provide otherwise;

- the act of vesting was always valid; and

\textsuperscript{287} \textit{Western Australia v Ward} (2002) 191 ALR 1 at [219] and [222] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\textsuperscript{288} \textit{Western Australia v Ward} (2002) 191 ALR 1 at [223] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\textsuperscript{289} \textit{Western Australia v Ward} (2002) 191 ALR 1 at [235] to [241] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
• those whose native title was extinguished have no right to compensation.\(^{290}\)

*Post RDA: scenario two applies*

If a reserve was vested under s. 33 of the *Land Act* on or after the RDA commenced but before 1 January 1994, then the act of vesting:

• was *not* invalid to any extent because of the existence of native title (i.e. it is *not* a past act) but the native title holders would have a right to compensation under the RDA;\(^{291}\)

• in cases where a reserve was vested for the purpose of preserving the environment (e.g. for the creation of a national park), then the vesting was *not* a previous exclusive possession act because s. 23B(9A) applies because such acts are excluded from the definition of ‘previous exclusive possession act’. However, native title is still extinguished as a result of the application of the inconsistency of incidents test;\(^ {292}\)

• in the case of a reserve vested in the Crown or a statutory authority (as defined in s. 253), the act of vesting wholly extinguished native title ‘apart from’ the state analogue to the NTA (i.e. native title was extinguished at common law by operation of the inconsistency of incidents test). Therefore, s. 23B(9C)(a) does not apply and so it is a previous exclusive possession act, confirmed as completely extinguishing native title under the state analogue to Div 2B Pt 2 of the NTA.\(^ {293}\)

Sections 47, 47A or 47B may, in some circumstances, apply to areas currently or formally vested under s. 33 of the *Land Act 1933* (WA), in which case all prior extinguishment must be ignored for all purposes under the NTA and the non-extinguishment principle will apply.

*Reserves vested after 1 January 1994*

\(^{290}\) *Western Australia v Ward* (2002) 191 ALR 1 at [249] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\(^{291}\) *Western Australia v Ward* (2002) 191 ALR 1 at [250] to [254] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. This must be dealt with under the NTA: see s. 45.

\(^{292}\) *Western Australia v Ward* (2002) 191 ALR 1 at [258] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

\(^{293}\) *Western Australia v Ward* (2002) 191 ALR 1 at [259] to [260]per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
The validity and the effect of any validation on native title of the vesting of a reserve under s. 33 of the *Land Act 1933* (WA) on or after 1 January 1994 but before 31 March 1998\(^{294}\) over an area where native title existed at the time would be determined by applying the past, intermediate period and future act provisions. In some cases, such a vesting will be invalid i.e. of no legal force or effect. Note that the *Land Administration Act 1997* (WA) does not provide for reserves to be vested in this way.

\(^{294}\) The date on which the *Land Act 1933* (WA) was replaced by the *Land Administration Act 1997* (WA).
Appendix 1

**Historical snapshot: common law and statutory developments**

by Graeme Neate  
President  
National Native Title Tribunal

Before 1992, the common law of Australia did not recognise the native title rights and interests of Indigenous Australians. In his 1971 judgment in *Milirrpum v Nabalco Pty Ltd*, Justice Blackburn of the Northern Territory Supreme Court decided that the doctrine of communal native title did not form and never had formed part of the law of any part of Australia.\(^{295}\) That judgment was not appealed. In subsequent decades various statutes were enacted by Federal, state and territory legislatures to provide for the grant of areas of land to Aboriginal peoples and Torres Strait Islanders. The statutes prescribed the areas or categories of land that could be granted, the process for the grant (or claim and grant), and the limitations on dealings with or use of that land.

In the 1992 judgment in *Mabo v Queensland (No 2)*, by a majority of 6:1, the High Court of Australia held that:

> The common law of this country recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands.\(^{296}\)

In the lead judgment, Justice Brennan (with whom Chief Justice Mason and Justice McHugh agreed) stated:

\(^{295}\) *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 245.  
\(^{296}\) *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 15.
The term ‘native title’ conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants.\(^{297}\)

Native title has its origin in and is given its content by the traditional laws and customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.\(^{298}\)

Native title to particular land … its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land.\(^{299}\)

In *Mabo (No 2)* and subsequently, the High Court has stated that native title rights and interests can be recognised and enforced even though they do not have the features of other legal rights and interests in land and do not have precise common law equivalents. Some judges have described native title as *sui generis*.\(^{300}\)

In 1993 the Federal Parliament enacted the *Native Title Act 1993* (the NTA). The preamble to the NTA sets out considerations taken into account by the Parliament in enacting it. The main objects of the NTA, as listed in s 3, are:

- to provide for the recognition and protection of native title; and
- to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and
- to establish a mechanism for determining claims to native title; and
- to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title.

\(^{297}\) *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 57.
\(^{298}\) *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 58.
\(^{299}\) *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 70.
The NTA defines ‘native title’ and ‘native title rights and interests’ in s 223, adapting the language used by Brennan J in *Mabo (No 2).* The key part of that definition is:

(1) The expression **native title** or **native title rights and interests** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
   (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
   (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
   (c) the rights and interests are recognised by the common law of Australia.

(2) Without limiting subsection (1), **rights and interests** in that subsection includes hunting, gathering, or fishing, rights and interests.

Since the High Court’s judgment in *Mabo (No 2)* and the enactment of the NTA, the High Court has ruled on a range of native title issues. The first cases were:

- **Western Australia v Commonwealth** (1994-1995) 183 CLR 373;

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301 The High Court has recognised the link between the statutory definition and the judgment of Brennan J in *Mabo (No 2)*: see *Western Australia v Ward* (2002) 191 ALR 1 at [16] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, Kirby J at [568]; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 at [32], [70], [75] per Gleeson CJ, Gummow and Hayne JJ and *Commonwealth v Yarmirr* (2001) 208 CLR 1 at [7].

302 The remainder of the definitions is as follows:

(3) Subject to subsections (3A) and (4), if native title rights and interests as defined by subsection (1) are, or have been at any time in the past, compulsorily converted into, or replaced by, statutory rights and interests in relation to the same land or waters that are held by or on behalf of Aboriginal peoples or Torres Strait Islanders, those statutory rights and interests are also covered by the expression **native title** or **native title rights and interests**.

Note: Subsection (3) cannot have any operation resulting from a future act that purports to convert or replace native title rights and interests unless the act is a permissible future act.

(3A) Subsection (3) does not apply to rights and interests conferred by Subdivision Q of Division 3 of Part 2 of this Act (which deals with statutory access rights for native title claimants).

(4) To avoid any doubt, subsection (3) does not apply to rights and interests created by a reservation or condition (and which are not native title rights and interests):
   (a) in a pastoral lease granted before 1 January 1994; or
   (b) in legislation made before 1 July 1993, where the reservation or condition applies because of the grant of a pastoral lease before 1 January 1994.
Themes emerging from the High Court’s recent native title decisions

- *Wik Peoples v Queensland* (1996) 187 CLR 1 (*Wik*);

In the early judgments, the High Court expressly acknowledged that the common law in relation to native title was developing. 303

The matters decided more recently (and discussed in this paper) have involved the interpretation of the NTA, and rulings about where and how native title (as recognised and protected under the NTA) continues to operate in relation to other rights and interests in land or waters, and the impact of other legislation on native title rights and interests.

Appendix 2

| Matters to which regard should be had to determine effect of a particular act on native title¹ | Period in which act affecting native title was done |
|---|---|---|---|---|
| | Pre-RDA | RDA to NTA | NTA to Wik | Post-Wik |
| Sections 47, 47A or 47B NTA² | ✓ | ✓ | ✓ | ✓ |
| Confirmation of extinguishment³ | ✓ | ✓ | ✓ | x |
| - PEPA⁴ | ✓ | ✓ | ✓ | ✓|
| - PNEPA⁵ | ✓ | ✓ | ✓ | ✓ |
| Past act provisions⁷ | x | ✓ | ✓ | ✓ |
| Intermediate act provisions⁹ | x | x | ✓ | x |
| Future act provisions | x | x | ✓ | ✓ |
| Inconsistency of incidents test¹¹ | ✓ | ✓ | ✓ | ✓ |

¹ This is, generally speaking, the order in which these matters should be considered. In most cases, where act is attributable to the state or territory, the state or territory analogous legislation must be considered first.

² If one of these applies, then all extinguishment brought about by the creation of a ‘prior interest’ must be disregarded for all purposes under the NTA. Inconsistent native title rights and interests are suspended for the duration of the ‘prior interest’.

³ In determining the effect of any particular act on native title, the confirmation of extinguishment provisions take priority over the past act and intermediate act provisions unless the act in question is both a previous non-exclusive possession act and a Category A past act, in which case the effect of determined by the past act provisions: see s 23C(3), s 23G(2) and (3) and the state or territory analogue.

⁴ Previous exclusive possession acts. These are, generally speaking, valid or validated acts done on or before 23 December 1996 consisting of the grant of freehold or of a certain type of lease or a vesting that confers a right of exclusive possession or the creation or establishment of a public work.

⁵ Previous non-exclusive possession acts. These are, generally speaking, valid or validated acts done on or before 23 December 1996 consisting of the grant of either a pastoral or agricultural lease that does not confer a right of exclusive possession.

⁶ See s. 23F(3) and the state or territory analogue.

⁷ In most cases, the past act provisions are only relevant to determining whether or not compensation is payable: see s 23C(3), s 23G(2) and (3).

⁸ See s. 228(3) to (9) and the state or territory analogue.

⁹ In most cases, the intermediate act provisions are only relevant to determining whether or not compensation is payable: see s 23C(3), s 23G(3).

¹⁰ In this period, regard should first be had to the intermediate act provisions.

¹¹ This test is particularly relevant where the effect of the act in question is partial extinguishment of native title or suspension of native title rights and interests because it will determine the extent to which native title rights and interests are either extinguished or suspended, which is (in either case) to the extent of any inconsistency.
Appendix 3

Themes emerging from the High Court’s recent native title decisions

Legislative future acts

Non legislative Future acts

31/10/75
RDA commenced

1/7/93
NTA commenced

1/1/94
Wik decision

Intermediate period acts

Legislative past acts

Non-legislative past acts but note that some happen after 1 January 1994: see s. 228(3)

Previous exclusive possession acts and previous non-exclusive possession acts. Note that some PNEPAs happen after 23 December 1996: see s. 26F(3)