Protecting Marine Parks in Reality: The Role of Regional and Local Communication Programs

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Introduction

On 1 July 2004 the area of highly protected ("no take") zones in the Great Barrier Reef Marine Park increased five fold to over 25 per cent of the total park.

Less that two years earlier Victoria declared a suite of "no take" marine reserves (national parks and sanctuaries) which took the amount of sea area to be highly protected to 5.5 per cent of Victoria's coastal waters - a 100 fold increase overnight.

But the declaration of highly protected areas does not automatically mean the protection of these areas. A combination of increased enforcement (via 20 new Fisheries Officers in Victoria's case) and community education programs to encourage voluntary compliance provides the perceived methods of protecting such areas.

Informing the public of the declaration of a park is an important step for any newly declared protected area. If people are aware of a parks existence and the rules within the park, they are more likely to comply with those rules and respect persons charged with managing the park (Kelleher et al., 1995).

Assuring compliance with regulations is achieved in two main ways: enforcement and education. It has been found that education works effectively at increasing compliance with regulations in a Marine Protected Area (MPA) (Alcock 1991; Kenchington, 1990). Alder (1996) in a study on the cost effectiveness of enforcement vs. education in the Cairns section of the Great Barrier Reef Marine Park found that education was more cost effective than enforcement. The Great Barrier Reef Marine Park Authority (GBRMPA) realizing the importance of education, has made it a priority from the time of its declaration in 1975 (Alcock, 1991; Kenchington, 1990).

In light of these recent substantial increases in highly protected marine parks, we would like to report on a study carried out immediately prior to and after the declaration of Victoria's "no-take" marine protected areas (MPAs). The outcomes of the study should prove of benefit to the recent Great Barrier Reef changes and to State, Territory and Commonwealth governments contemplating expanding MPAs.

The Study

Victoria's new thirteen Marine National Parks and eleven Marine Sanctuaries all ban fishing or collecting of any kind (hence the term "no-take"). The legislation to declare the reserves was first introduced into parliament in July 2001 but was withdrawn due to the protests of commercial and recreational fishers (Rollins and Baker, 2001). Several days before the Victorian state election in November 2002 the parks were finally declared after 20 years of research and campaigning. To inform the public of the Parks and Sanctuaries the management agency, Parks Victoria, developed two promotional activities: extensive signage near the reserves; and an advertising campaign in cinemas and on television. The advertisements were aired from August to December 2002, while the signs appeared around the declaration date of 16 November 2002 and were erected at each Marine National Park and Marine Sanctuary and at all nearby boat ramps.

The aim of the study by Blayney (2003) was to assess the impact of these two information components on public perceptions and hence on the potential for voluntary compliance to park protection. The case study was of four sites within the Surf Coast Shire, 2 hours south west of Melbourne. The sites chosen were Pt Addis Marine National Park, Pt Danger Marine Sanctuary and two nearby control sites at Pt Roadknight and Urquharts Bluff.

Questionnaire surveys were conducted using face-to-face interviews on beaches and rocky shores from November 2002 to February 2003. Questions on signage were only asked at Urquharts Bluff because it was the only place that signs had been erected by the declaration date.

The survey showed that 53 per cent of respondents (n = 192) did not know that the Marine National Parks and Sanctuaries were to be declared, or had been recently declared. Seventy-seven per cent of respondents (n = 96) did not know they were in a Marine National Park, Sanctuary or in close proximity to one when interviewed. Seventy-nine per cent of respondents (n = 192) had not

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seen the T.V. commercials for the Marine National Parks and Sanctuaries. Sixty-one per cent of respondents had not seen the sign for Marine National Parks at Urquharts Bluff, while 43 per cent of respondents who had seen the sign had not read it.

Of respondents who were aware of the existence of the Marine National Parks and Sanctuaries, 61 per cent of respondents stated that various forms of media had been their source of information about Marine National Parks and Sanctuaries, with television news accounting for 31 per cent of the total, followed by newspapers (24 per cent). Family and friends were the next most popular source of information (17 per cent) followed by school or university (7 per cent).

The proportion of respondents who were aware that a series of Marine National Parks and Sanctuaries had been declared on 16 November 2002 was surprisingly low (47 per cent). The number of respondents who knew the national parks existed may have been inflated in this study, because many respondents commented that they became aware of the Marine National Parks and Sanctuaries through the protests of commercial fishers who marched on Parliament in 2001, rather than through the declaration announcement. This result is similar to that of Goyen and White (2003) who found that only 7 per cent of respondents had become aware of the Marine National Parks and Sanctuaries through the T.V commercials.

These results suggest that the television and cinema commercials were not an effective means of making people aware of the Marine National Parks and Sanctuaries. This is in contrast with the GBRMPA which has had success with regional advertising campaigns, although these have been aired intensely over a two-month period (Alcock, 1991).

The other main mechanism that Parks Victoria used to create awareness of the Marine National Parks and Sanctuaries was through signage at the sites and boat access ramps. Approximately $500 000 was spent on the signs and boundary markers (J. Mumford pers.comm.). The signs were placed at all four of the sites in the study area; the signs at the control sites (non-MPAs) were for the nearest Marine National Park and were so located because of the presence of boat access ramps. The first sign went up in November 2002 at Urquharts Bluff with the other sites following in December 2002 and January 2003.

Only 39 per cent of the visitors interviewed had seen the sign at Urquharts Bluff and of those, just over half had read it. Only 3 per cent of respondents became aware of the Marine National Parks and Sanctuaries through the signs. The lack of awareness of the signs may be due to the number, orientation and nature of the signs. Signs at Pt Danger, Pt Addis and Pt Roadknight were placed at access points that were not highly used (Blayney, 2003). More signs at Pt Danger and Pt Addis would help to increase users’ awareness. Positioning them at the most used access points would maximise their exposure to beach users.

Many of those who had seen and read the sign at Urquharts Bluff were confused as to whether they were in a Marine National Park or not, as the sign referred to Pt Addis Marine National Park 3km away by sea. This suggests that boaters at the site might also be confused, as the sign was placed there for them.

Discussion

The survey demonstrated that the government's promotional activities failed to create widespread awareness of the Marine National Parks and Sanctuaries, even amongst those people who actually visited Marine National Parks and Sanctuaries at Pt Addis and Pt Danger. Even fewer respondents knew that they were in a Marine National Park or Sanctuary (23 per cent). However, this might be due to the lack of signage or the lack of prominence of the signage at the sites. Porter (1999) found that 43 per cent of respondents were aware they were in a marine reserve at Pt Lonsdale (Victoria) while Williams (1996) in a study on two marine reserves near Adelaide, found 58 per cent of respondents were aware they were in an aquatic reserve.

In addition, the study showed that the vast majority of respondents had not seen the television commercial for the Marine National Parks and Sanctuaries (79 per cent). Further, many of the people interviewed were unsure about when they had seen the commercials or what was on them, putting into question whether they had actually seen the commercials. The lack of awareness of the commercials is further supported by the small number of respondents who cited the commercials as their source of knowledge for the Marine National Parks and Sanctuaries (1 per cent). This result was similar to that of Goyen and White (2003) who found that only 7 per cent of respondents had become aware of the Marine National Parks and Sanctuaries through the T.V commercials.
Conclusions

In future Parks Victoria, as the management agency, will need to widen its communications strategy and use local media and community groups more effectively. Such an approach is likely to be more effective in meeting the conservation objectives of the MPA; in addition it will be far less expensive than paid television and cinema advertising. The use of both passive and active methods to inform the public of the Marine National Parks and Sanctuaries would be an improvement. Parks Victoria’s methods to publicise the declaration of the parks were passive, while those used by the GBRMPA include both passive (e.g. signs) and active methods (e.g. training tourist operators) resulting in educated and compliant users.

The key finding of this research was that whilst it is important to communicate the rights and obligations surrounding visitors to recently declared, or enhanced protected sections of, Marine Protected Areas, it is equally (if not more) important to follow up with locally targeted communication and education programs specific to the needs and profiles of the local communities. To illustrate, in Victoria, Blayney (2003) found the profiles of visitors to different sites varied significantly; for example from holiday home owners on regular visits, to day-visitors on their first visit to the region. One would expect the management authority to vary its approach in order to satisfy these different visitor types.

The authors are hopeful that this will occur in both the Victorian and Great Barrier Reef cases, thus enabling the protection of the reserves to be enhanced by voluntary compliance with restrictions rather than more expensive and negative enforcement procedures.

References


NATIVE TITLE RIGHTS AFTER YORTA YORTA

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Abstract

This paper examines the impact of the High Court decisions in Yarmirr, Ward and Yorta Yorta on the native title rights and interests which can be established under the Native Title Act 1993 (Cth), and the evidence that is required to prove native title rights and interests which will be recognised at common law. The paper particularly focuses on the notion of a society with a normative system. The paper also deals with the form of an application for a determination of native title and the description of native title rights and interests by reference to activities and extinguishment issues.

INTRODUCTION

This paper focuses on specific issues raised by the decisions and arguments which have been and can be put in relation to the High Court’s decisions and the operation of the Native Title Act 1993 (Cth) (‘NTA’). The author draws on experience from native title claims approaching the end of the trial process following the High Court’s decisions in Yarmirr,1 Ward2 and Yorta Yorta,3 including the Bardi and Jawi claim to the Dampier Peninsula and sea in the North West Kimberley and the Ngarluma and Yindjibarndi claim in the Western Pilbara region.4

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4 The contribution of Carolyn Tan, as Junior Counsel, to the closing submissions in the Ngarluma and Yindjibarndi case is acknowledged; and is reflected in some parts of this paper.
The specific issues in relation to which legal arguments will be discussed will include:

8. The relationship of the normative system of a society to the group who hold common or group rights under the NTA;
9. The evidence required to prove a normative system which arises prior to and from the assertion of British sovereignty;
10. The proof of connection of both a spiritual and physical kind;
11. The right to protect culture by means connected to land and waters;
12. The evidence required to prove a right to control access and make decisions about access and the notion of partial extinguishment of that right offshore, in tidal areas, on pastoral leases and in relation to mining leases;
13. The effect of improvements on pastoral leases and mining leases and s 44H of the NTA;
14. The concept of reasonable user and coexisting titles;
15. The vesting of reserves, in particular national parks and nature reserves in a State (Western Australia) and the operation of the Racial Discrimination Act (‘RDA’) (the conclusions of the High Court in Ward will be critiqued);
16. The effect of the RDA on extinguishment of native title upon the granting of a mining lease (the conclusions of the High Court in Ward will be critiqued).

The High Court’s recent decisions in Ward, Yarmirr and Yorta Yorta affirm that the principles at common law for establishing native title are relevant to a determination of native title under the NTA only in so far as they are not inconsistent with the concepts set out in the NTA, in particular in ss 223 and 225.

I NORMATIVE SYSTEM

The High Court in Yorta Yorta for the first time linked native title rights and interests to a normative system. The High Court did not adopt a narrow Austinian definition of a normative system which requires that there be an expectation of some retribution for non-observance of a norm. The High Court in Yorta Yorta suggested a much broader notion of what might comprise a normative system when their Honours said:

To speak of such rights and interests being possessed under, or rooted in, traditional law and traditional custom might provoke much jurisprudential debate about the difference between what H L A Hart referred to as ‘merely convergent habitual behaviour in a social group’ and legal rules. The reference to traditional customs might invite debate about the difference
between 'moral obligation' and legal rules. A search for parallels between traditional law and traditional customs on the one hand and Austin's conception of a system of laws, as a body of commands or general orders backed by threats which are issued by a sovereign or subordinate in obedience to the sovereign, may or may not be fruitful. Likewise, to search in traditional law and traditional customs for an identified, even an identifiable, rule of recognition which would distinguish between law on the one hand, and moral obligation or mere habitual behaviour on the other, may or may not be productive....

This last question may, however, be put aside when it is recalled that the Native Title Act refers to traditional laws acknowledged and traditional customs observed. Taken as a whole, that expression, with its use of 'and' rather than 'or', obviates any need to distinguish between what is a matter of traditional law and what is a matter of traditional custom. 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.5

The High Court in Yorta Yorta made the following pronouncements on the law governing native title:

(1) Origin of rights and interests

When it is recognised that the subject matter of the inquiry is rights and interests (in fact rights and interests in relation to land or waters) it is clear that the laws or customs in which those rights or interests find their origins must be laws or customs having a normative content and deriving, therefore, from a body of norms or normative system — the body of norms or normative system that existed before sovereignty.6

(2) Pre-sovereignty origin

... the native title rights and interests to which the Native Title Act refers are rights and interests finding their origin in pre-sovereignty law and custom7

(3) 'Traditional'

... in the context of the Native Title Act, 'traditional' carries with it two other elements in its meaning. First, it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander

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5 Yorta Yorta [2002] HCA 58, [41], [42] (Gleeson CJ, Gummow and Hayne JJ).
6 Ibid [38].
7 Ibid [45].
Native Title Rights after *Yorta Yorta*

societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are 'traditional' laws and customs.⁸

(4) Continuing vitality

Secondly, and no less importantly, the reference to rights or interests in land or waters being possessed under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty⁹

(5) 'Society'

...Law and custom arise out of and, in important respects, go to define a particular society. In this context, 'society' is to be understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs....¹⁰

(6) Inference from present

... In many cases, perhaps most, claimants will invite the Court to infer, from evidence led at trial, the content of traditional law and custom at times earlier than those described in the evidence....¹¹

(7) Pre-sovereignty normative society

... it is necessary to demonstrate that the normative system out of which the claimed rights and interests arise is the normative system of the society which came under a new sovereign order when the British Crown asserted sovereignty, not a normative system rooted in some other, different, society."¹²

Comparison with Mabo

Those statements are not inconsistent with the views of Justices Brennan and Toohey in *Mabo (No 2)*,¹³ that it is not necessary to prove the 'kind of society' which existed prior to the assertion of sovereignty in order to find that there was a society which sustained rights and duties from which present laws and customs derive.¹⁴

The views of the High Court in *Yorta Yorta* are also not inconsistent with views expressed in *Mabo (No 2)*, in relation to the Meriam people, that:

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⁸ Ibid [46].
⁹ Ibid [47].
¹⁰ Ibid [49].
¹¹ Ibid [80].
¹² Ibid [89].
¹³ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ("Mabo (No 2)").
¹⁴ Ibid 61, 187.
(f) It is true that the findings of Moynihan J do not allow the articulation of a precise set of rules and that they are inconclusive as to how consistently a principle was applied in local law, for example, with respect to inheritance of land, but... the particular nature of the rules which govern the society or which describe its members' relationship with land does not determine the question of traditional land rights. Because rights and duties inter se cannot be determined precisely, it does not follow that traditional rights are not to be recognised by the common law.

(g) It is impossible to identify any precise system of title, any precise rules of inheritance or any precise methods of alienation. Nonetheless, there was undoubtedly a local system under which the established familial or individual rights of occupation and use were of a kind which far exceeded the minimum requirements necessary to found a presumptive common law native title.

II CHANGE

In *Yorta Yorta* it was said that the laws or customs in which the rights or interests find their origins must be laws or customs having a normative content and deriving, therefore, from a body of norms or normative system that existed before sovereignty. The individual laws or customs do not have to be substantially the same, as long as their origins derive from a body of norms or normative systems that existed before sovereignty. It is the normative system that must have continuous existence. The key question as far as any change is concerned, is whether the law or custom can still be seen to be a traditional law or traditional custom and whether the change or adaptation is of such a kind that it can no longer be said that the rights and interests are possessed under the traditional laws acknowledged and traditional customs observed by the relevant peoples. The requirement since sovereignty of continuous (without substantial interruption) acknowledgment and observance of those laws and customs does not mean that the content of law and customs must be the same. What must continue is observance or acknowledgment of the same normative system.

Laws and customs are not required to be the same now as they were 'pre-contact' in order for them to be 'traditional' within the terms of the NTA's

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15 Ibid 199 (Toohey J).
16 Ibid 115 (Deane and Gaudron JJ).
17 [2002] HCA 58, [38] (Gleeson CJ, Gummow and Hayne JJ).
18 Ibid [46].
19 Ibid [47].
20 Ibid [83].
21 Ibid [87].
223. Traditional laws and customs may change, evolve or be transformed without losing their 'traditional' character. The High Court in *Yorta Yorta* said:

The rights and interests in land which the new sovereign order recognised included the rules of traditional law and custom which dealt with the transmission of those interests. Nor is it to say that account could never be taken of any alteration to, or development of, that traditional law and custom that occurred after sovereignty. Account may have to be taken of developments at least of a kind contemplated by that traditional law and custom.

The High Court in *Yorta Yorta* was not suggesting that it is only the 'way of life' of a society in relation to which change can be tolerated by the common law, so long as there is no change to any law or custom since sovereignty. What their Honours said was required is 'an identified body of laws and customs' of a normative system of a society which has continued 'substantially uninterrupted since sovereignty' in its acknowledgment and observance. Indeed, their Honours said:

...demonstrating some change to, or adaptation of, traditional law or custom or some interruption of enjoyment or exercise of native title rights or interests in the period between the Crown asserting sovereignty and the present will not necessarily be fatal to a native title claim. ...The key question is whether the law and custom can still be seen to be traditional law and traditional custom. Is the change or adaptation of such a kind that it can no longer be said that the rights or interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified?

Kirby J in *Ward* referred to 'the capacity of the common law to recognise change and development in traditional laws and customs'. He preferred an approach which 'envisages the extension of such recognition to modern conditions, developed over time, so as to incorporate the use of other minerals and resources of modern relevance'. He noted that '[s]uch an approach is generally consistent with the authority of this Court'. He referred to:

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22 *Yorta Yorta v Victoria* (2001) 110 FCR 244, [35], [43], [119], [122]–[132].
23 *Yorta Yorta* [2002] HCA 58, [44].
24 Ibid [50] (emphasis added).
25 Ibid [87].
26 Ibid [83].
27 *Ward* [2002] HCA 28, [574].
28 Ibid.
29 Ibid.
(g) *Mabo (No 2)*, where Brennan J said: ‘Of course in time the laws and customs of any people will change’\(^3\) and

\[\text{[i]t is immaterial that the laws and customs have undergone some change since the Crown acquired sovereignty provided the general nature of the connexion between the indigenous people and the land remains.}\]

and where Deane and Gaudron JJ said:

> The traditional law and custom is not, however, frozen as at the moment of establishment of a Colony. Provided any changes do not diminish or extinguish the relationship between a particular tribe or other group and particular land, subsequent developments or variations do not extinguish the title to that land.\(^3\)

(h) *Yanner v Eaton*, where Gummow J spoke of an ‘evolved form of traditional behaviour’,\(^3\) referring to the use of a mechanical method of hunting not known before European contact and citing the passages from *Mabo (No 2)* referred to above; and

(i) *Yarmirr*, where Kirby J said ‘the principle of non-discrimination must include recognition that the culture and laws of indigenous peoples adapt to modern ways of life and evolve in the manner that the cultures and laws of all societies do’,\(^4\) referring to *Mabo (No 2)*\(^3\) and *Lansman v Finland*.\(^6\)

The views expressed by the majority in *Yorta Yorta* concerning the nature of the change which the common law will tolerate are not consistent with any inference of disapproval of Kirby J’s view in *Ward*.\(^3\) The majority of the High Court in *Ward*\(^4\) found that there was no evidence to establish any traditional law, custom or use relating to petroleum or substances dealt with by the *Mining Act 1904* or the *Mining Act 1978*. It was not addressing the question of whether traditional laws or customs might evolve to embrace use of a substance of modern relevance which might have been established by the evidence.

The High Court said in *Yorta Yorta* that:

\[^3\] (1992) 175 CLR 1, 61.

\[^4\] Ibid 70.

\[^5\] Ibid 110.

\[^6\] (1999) 201 CLR 351, 381–2 [68].

\[^7\] (2001) 184 ALR 113, [295]–[296].

\[^8\] (1992) 175 CLR 1, 70, 110, 192.


\[^{10}\] *Ward* [2002] HCA 28, [574].

\[^{11}\] Ibid [382].
account must no doubt be taken of the fact that both parts (a) and (b) of the
definition of native title 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. 39

It is the laws and customs and the society that must be continuous since the
assertion of sovereignty, not necessarily the connection of a particular
native title holding group to particular land.

In *Yorta Yorta* the Court was speaking of ‘a body of norms or normative
system’ 40 and ‘the normative system under which the rights and interests
are possessed’. 41 The Court was not proscribing the possibility of the
waning and revival of the observance of particular laws within the
operation of a normative system. It is the waning of the system as a whole
to which their Honours directed their attention, when they said:

If that normative system has not existed throughout that period, the rights and
interests which owe their existence to that system will have ceased to exist.
And any 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.”

In relation to the continuity of the system, the Court said:

Nor is it to say that account could never be taken of any alteration to, or
development of, that traditional law and custom that occurred after
sovereignty. Account may have to be taken of developments at least of a kind
contemplated by that traditional law and custom. 42

That analysis would not preclude the recognition of particular rights which
may have waned and revived in their exercise, which ‘find their origin in
pre-sovereignty law and custom’. 43

In *Yorta Yorta* it was said that, in the proposition that acknowledgment and
observance of laws and customs must have continued substantially
uninterrupted, the qualification ‘substantially’ is not unimportant. 44 It is a
qualification that must be made to recognise that European settlement has
had the most profound effects on Aboriginal societies and that it is,

39  *Yorta Yorta* [2002] HCA 58, [85].
40 Ibid [38].
41 Ibid [47].
42 Ibid.
43 Ibid [44].
44 Ibid.
therefore, inevitable that the structures and practices of those societies, and their members, will have undergone great change since European settlement. Nonetheless, due to the fact that possession of rights and interests under traditional laws and customs must be identified, it is necessary to demonstrate that the normative system out of which the claimed rights and interests arise is the normative system of the society which came under a new sovereign order when the British Crown asserted sovereignty, not a normative system rooted in some other, different society.

III GROUP RIGHTS AND SOCIETY

The High Court in *Yorta Yorta* said:

Laws and customs do not exist in a vacuum. They are, in Professor Julius Stone’s words, ‘socially derivative and non-autonomous’. As Professor Honoré has pointed out, it is axiomatic that ‘all laws are laws of a society or group’. Or as was said earlier, in Paton’s Jurisprudence, ‘law is but a result of all the forces that go to make society’. Law and custom arise out of and, in important respects, go to define a particular society. In this context, ‘society’ is to be understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs.

The High Court in *Yorta Yorta* explain: ‘We choose the word “society” rather than “community” to emphasise this close relationship between the identification of the group and the identification of the laws and customs of that group’.

A group which holds ‘common or group rights comprising the native title’ is not required to also hold social, economic, political or religious elements which are peculiar to the group. In any event, a group which holds ‘common or group rights comprising the native title’ is not required to also share features such as a high degree of intermarriage, law practices, rights and interests beyond those relating to land and waters or a tendency to band together and speak with one voice in the political and social realm.

As a matter of law, a group which holds such ‘common or group rights comprising the native title’ is not required to (a) be a community which held title at sovereignty; (b) share cultural links presently and traditionally;

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46 In relation to the evolution of traditional laws and customs, see also *Yorta Yorta v Victoria* (2001) 110 FCR 244, [35], [43], [119], [122]–[132].
47 [2002] HCA 58, [49].
48 Ibid.
49 NTA s 225(a).
50 NTA s 225(a).
or (c) be distinctly associated with the land on account of requirements (a) and (b); so long as the group possesses the rights under traditional laws and customs derived from a ‘normative system that existed before sovereignty’ and the society ‘has had a continuous existence and vitality since sovereignty’.

A Continuing Society

Laws and customs of a normative society may, among other things, describe rights and interests in relation to land or waters and describe the relationships which exist within a society as among its members: both may have normative content. Those laws and customs which are not directly relevant to rights and interests in land are relevant in a native title claim to provide support for drawing an inference as to a society with ‘a continuous existence and vitality since sovereignty’.

B Inference of Continuity

In order for the connection of members of the group of Aboriginal people to be in accordance with traditional laws and customs, pursuant to s 223(1)(b) of the NTA, it needs only to be a connection based upon laws and customs which come from a past generation. There is no requirement to establish knowledge by living persons of a particular depth of generational connection in order to prove that the connection is in accordance with traditional laws and customs. The evidence as a whole must lead to an inference that the laws and customs are those of a normative system of a society which existed at the time of the assertion of British sovereignty.

C Particular Group

The connection of particular persons or a particular ‘group of persons’ with particular land or waters does not have to be continuous since the assertion of British sovereignty if the laws and customs out of which the connection arises are those of a normative system of a society which has continued ‘substantially uninterrupted since sovereignty’ in its

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31 Yorta Yorta [2002] HCA 58, [38].
32 Ibid [47].
33 Ibid.
34 NTA s 225(a).
35 Yorta Yorta [2002] HCA 58, [87].
acknowledgment and observance of 'an identified body of laws and customs'.\(^{56}\) *Yorta Yorta* does not interpret the *NTA* in such a way that native title may only exist as a burden on the radical title of the Crown if an Aboriginal society has *maintained continuous connection* with its traditional country since the acquisition of British sovereignty. The High Court in *Yorta Yorta* said that the *NTA* requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a *system* that has had a continuous existence and vitality since sovereignty\(^{57}\) and

that the normative system out of which the claimed rights and interests arise is the normative system of the society which came under a new sovereign order when the British Crown asserted sovereignty, not a normative system rooted in some other, different, society. To that end it must be shown that the *society*, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout that period as a body united by its acknowledgment and observance of the laws and customs\(^{58}\).

If the connection with land and waters is in accordance with traditional laws and customs then it satisfies the requirements of the *Native Title Act* section 223(1)(b).

### D Sub-groups

As the High Court said in *Yorta Yorta*, a society is that "body of persons united in and by its acknowledgment of a body of law and custom"\(^{59}\). The society is made up of the broadest group who are so united. Within that society there may be sub-groups. Such sub-groups will, by definition, also be united in the same way, but that does not make each sub-group a separate society. Estate groups are an example of a sub-group of the society, created and defined by rules of the society to which all members of the society adhere. An estate group does not create the particular descent rule by which its membership is defined nor the rules which allocate rights to its members. It therefore cannot be regarded as a society.

The High Court did not disturb the finding of Lee J and the Full Federal Court in *WA v Ward*\(^{60}\) that the Miriuwung and Gajerrong peoples, who observed a common set of traditional laws and customs, held a communal

\(^{56}\) Ibid [50].

\(^{57}\) Ibid [47] (emphasis added).

\(^{58}\) Ibid [89] (emphasis added).

\(^{59}\) Ibid [49] (emphasis added).

\(^{60}\) (2000) 99 FCR 316, [229].
native title which accorded rights to sub-groups in relation to lands within the claim area. There is no inconsistency between that conclusion and the articulation of the law by the High Court in *Yorta Yorta*. In *Yorta Yorta* the High Court focused on the society which holds in common a set of normative rules, that is indistinguishable in substance (other than being more narrowly focused) from the notion of a community (composite or otherwise) acknowledging and observing a common set of traditional laws and customs.

The only persons who can hold native title rights and interests are those who form part of a society with a normative system arising from prior to the acquisition of British sovereignty which includes laws and customs which accord such rights and interests to such persons. An individual (or group), it seems, cannot acquire native title rights. The normative system of the society either accords rights or it does not. If it does so, then that is a feature of the system which must have existed since prior to the acquisition of British sovereignty, or must be an adaptation of a law or custom which can still be said to be traditional, in the sense suggested in *Yorta Yorta*. It is therefore doubtful whether anyone can acquire native title rights post-sovereignty provided they can bring themselves within the normative system of laws and customs.

**Boundaries of Groups**

It is not necessary for the Court to arrive at any conclusion as to the full extent of the Aboriginal boundaries in determining the native title rights and interests which exist within the area of land and waters the subject of the application before it. The Court needs only to determine whether or not Aboriginal people possess rights and interests under their traditional laws and customs in relation to the land and waters the subject of the application. There is no requirement of the type at common law for proof of precise boundary lines between tribal groups in order to make a determination of the existence of native title.

**Rights Internal to the System**

Nothing in the High Court’s decision in *Ward* or the definition of native title in s 223 of the *NTA* detracts from the fact that the nature of a communal native title or native title rights held by a group of Aboriginal

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61 *Yorta Yorta* [2002] HCA 58, [53], [54], [56].
62 Ibid [46], [47], [83].
63 See *NTA* s 223(1).
people as against the rest of the world is distinct from the rights which individual members of the group or sub-groups within the group may have.

When the High Court in *Yorta Yorta* referred to 'a body of laws and customs' which is 'productive of existing rights or interests', this should be understood in the same sense as in *Ward*, where their Honours said 'several kinds of rights and interests in relation to land ... exist under traditional law and custom'. The members of a society as a group may acknowledge the kinds of rights and interests which exist within the society. Rights may vest in individuals or groups within the society in relation to particular portions of the area to which the society is connected in accordance with traditional law and custom. The exercise or enforcement of those rights may also fall to the individual in respect of that particular portion.

The nature of the connection and of the rights and interest may vary according to the traditional laws and customs upon which they are based. The rights of an individual may be acknowledged by a native title holding group in relation to several areas which are determined to be the subject of native title rights and interests held by a group.

**G In Rem Determination and Group Rights**

An application may be made, pursuant to s 61 of the *NTA*, which may not ultimately be consistent with the terms of determination made pursuant to s 225(a), in relation to the definition of the holders of the common or group rights comprising a native title. The High Court did not suggest in *Ward* that there was any issue between the way the application was framed and the determination made in that case as to the holders of native title rights and interests. Section 61 of the *NTA* focuses on standing to make the application and describes a pre-condition of authorisation for an application to be made, because of the group nature of the rights and interests. The content of the application does not limit the content of the determination which the Court makes, pursuant to s 225 of the Act, as an *in rem* determination of the persons who hold rights and the rights they hold in relation to the land and waters the subject of the application.

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64 *Yorta Yorta* [2002] HCA 58, [50].
65 *Ward* [2002] HCA 28, [95].
66 See *NTA* s 223(1)(b).
67 See *NTA* s 225.
The connection to land and waters which must be demonstrated is a connection by the traditional laws and customs of the Aboriginal society. The dichotomy of a 'spiritual connection' and 'continuing use or physical presence' does not assist in the application. The only question is what the laws and customs indicate about the connection of the Aboriginal peoples to the land and waters. The dissenting views of McHugh and Callinan JJ in Ward that a spiritual connection will not satisfy s 223(1)(b) read something into the statutory provision which is not there.

Neither the terms of s 223(1)(b) of the NTA nor the words of the majority judgment of the High Court in Ward suggest any requirement for evidence of use or occupation. In fact the majority said:

No doubt there may be cases where the way in which land or waters are used will reveal something about the kind of connection that exists under traditional law or custom between Aboriginal peoples and the land or waters concerned. But 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.  

The dictum of Toobey J in Mabo (No 2) that 'traditional title is rooted in physical presence' may be of assistance in identifying native title at common law, but the High Court in Ward indicate that occupation does not identify rights and interests for the purposes of s 223(1)(a) of the NTA, and so neither can 'presence'. Still less does 'presence' comprise a necessary prerequisite to a finding of 'connection' for the purposes of s 223(1)(b) of the Act.

The majority judges in the High Court in Ward said: 'As is well recognised, the connection which Aboriginal people have with "country" is essentially spiritual'. Blackburn J in Milirrpum v Nabalco Pty Ltd described 'the aboriginals' relationship to the land' as 'a religious relationship'. O'Loughlin J in De Rose Hill v South Australia expressed the view that 'a spiritual or cultural connection' only may be a connection in accordance with traditional laws and customs for the purposes of s 223(1)(b) of the NTA. Brennan J said in Mabo (No 2):

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69 See NTA s 223(1)(b).
70 Ward [2002] HCA 28, [64].
71 (1992) 175 CLR 1, 188.
72 Ward [2002] HCA 28, [93].
73 Ibid [14].
74 (1971) 17 FLR 141, 167.
75 [2002] FCA 1342, [569] ("De Rose Hill").
many clans or groups of indigenous people have been physically separated from their traditional land and have lost their connexion with it. Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence76 (emphasis added).

At common law loss of “connexion” is a concept that is distinguishable from physical separation from an area. The majority judges of the Full Federal Court in Ward said that the ‘common law does not provide for the protection or enforcement of purely religious or spiritual affiliation with land, divorced from actual physical use and enjoyment of the land’.77 The majority judges were there making reference to the circumstance where, as the High Court held in Fejo v Northern Territory78 the ‘underlying existence of traditional laws and customs is a necessary prerequisite for native title but their existence is not a sufficient basis for recognising native title’ where it has been extinguished. The Full Federal Court in Ward held that a right to maintain, protect and prevent the misuse of cultural knowledge is a personal right rather than a right in relation to land,” The High Court in Ward took a similar view, and described a right of that kind as ‘something approaching an incorporeal right akin to a new species of intellectual property’.80 The High Court also commented therein that for example respecting access to sites where artworks on rocks are located or ceremonies are performed, the traditional laws and customs which are manifested at these sites answer the requirement of connection with the land found in par (b) of the definition in s 223(1) of the NTA.81

So that the correct analysis is that the common law will take into account a spiritual connection to land in determining whether the connection is in accordance with traditional laws and customs. That spiritual connection may be productive of rights and interests provided there is no grant which is inconsistent with any continuing native title rights and interests and provided the spiritual connection is not purely intellectual and can be related to land or waters.

The application by O'Loughlin J of the view he expressed in De Rose Hill, however, appears to have miscarried in the conclusion he reached that the

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80 [2002] HCA 28, [59].
81 Ibid.
‘traditional connection’ had been lost with the failure to maintain a physical connection with the area. That conclusion is inconsistent with the view expressed by the High Court in Ward that ‘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’.

The High Court in Ward said that where there is not a right of possession, or a right to control access to land or make binding decisions about the use to which it is put, then ‘it will 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’. However, it does not follow from that that s 225(b) requires the identification of rights which are capable of articulation in terms of an activity on the land.

The requirements of s 223(1)(b) of the NTA should not be confused with the evidence required to prove what may amount to rights and interests. Maintenance of a physical connection to an area is not a common law requirement of native title. The kind of ‘connection’ required by the relevant section does not depend upon a dichotomy between matters physical and matters spiritual when it comes to describing rights and interests. There is nothing to suggest that a physical connection only can exist under traditional laws and customs. The connection requirement may be satisfied by evidence of a spiritual connection, without having anything to say about the rights and interests which flow to persons who have such a connection. The nature of any rights claimed in respect of an area are not obliged to meet requirements imposed by s 223(1)(b) of the NTA.

It is the traditional law and custom alone that hold the key to the rights and interests which exist. Those rights may be in the form of rights to physical presence or use or enjoyment of the area in a variety of ways. Physical presence may often be the manifestation of the exercise of a right. It is not the prerequisite to the existence of a right.

While evidence of occupation or use may be relevant to determining connection, the absence of such evidence is not necessarily determinative of whether or not native title rights exist. 

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82 [2002] FCA 1342, [888].
83 [2002] HCA 28, [64].
84 Ibid [52] (emphasis added).
85 See Ward [2002] HCA 28, [64].
The majority said in Ward: 'The fact of occupation, taken by itself, says nothing of what traditional laws and customs provided'. However, the absence of evidence of some recent use of the land or waters does not, of itself, require a conclusion that there can be no relevant connection. Whether there is a relevant connection depends, in the first instance upon the content of traditional laws and customs and, in the second, upon what is meant by 'connection' by those laws and customs.

The High Court in Yorta Yorta said 'some interruption of enjoyment or exercise of native title rights or interests in the period between the Crown asserting sovereignty and the present will not necessarily be fatal to a native title claim'; and further:

Evidence that at some time, since sovereignty, some of those who now assert that they have that native title have not exercised those rights, or evidence that some of those through whom those now claiming native title rights or interests contend to be entitled to them have not exercised those rights or interests, does not inevitably answer the relevant statutory questions.

A 'lapsing' of rights and interests, in order to be established, requires more than the 'absence of evidence of some recent use of the land or waters'.

A  Extinction

1 Bundle of Rights

As the High Court made clear in WA v Ward: '[I]t is a mistake to assume that what the NTA refers to as "native title rights and interests" is necessarily a single set of rights relating to land that is analogous to a fee simple.' In Ward the High Court also said that where

in relation to some parts of the claim area, native title rights and interests that are found to exist do not amount to a right, as against the whole world, to possession, occupation, use and enjoyment of land or waters, it will seldom be appropriate, or sufficient, to express the nature of the rights and interests by using those terms ... Rather, ... it will be preferable to express the rights by

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86 Ibid [93] (Gleeson, Gaudron JJ).
87 Ibid [64].
88 [2002] HCA 58, [83].
89 Ibid [84].
90 Ibid.
91 [2002] HCA 28, [82].
Their Honours added that the metaphor of 'bundle of rights' draws attention to the fact that there may be more than one right or interest and secondly to the fact that there may be several kinds of rights and interests in relation to the land that exist under traditional law and custom.

The High Court has indicated in Ward that native title rights and interests comprise 'a bundle of rights, the separate components of which may be extinguished separately.' There may be parts of an area to which a continuing connection is maintained by native title holders where they are entitled to 'possession, occupation, use and enjoyment' of the determination area and other parts where, because of the nature of the rights possessed under traditional laws and customs and/or the existence of inconsistent rights which have extinguished one or more of the original components of the bundle of rights comprising the native title, other kinds of native title rights and interests may be determined to exist.

2 Possessory Title

The comprehensive way in which the laws and customs of the society of Aboriginal people who comprised the Meriam people and the Miriuwung and Gajerrong people connected them with the area of land and waters the subject of their claims established a title which is an all-encompassing interest in the land and waters. Where neither operation of the common law nor act of the Crown has extinguished a particular native title right or created a right which is inconsistent with a native title right which affects the land and waters the subject of this application (or where ss 47A and 47B of the Act operate to make such extinguishment a nullity), a determination as to a native title which comprises a full beneficial interest in the land is the appropriate determination. The High Court in Mabo (No 2) considered such an interest as 'possession, occupation, use and enjoyment' as against the world. That description of the interest is appropriate in such cases, except where some operative extinguishment is established. The High Court in Ward described that as a right to 'possession of the land'. The Court said that such an expression would be
‘apt to mislead’ where, as it said, ‘in relation to some parts of the claim area, native title rights and interests that are found to exist do not amount to’ such a right. What their Honours were referring to were some parts of the claim area where the right to control access to the area and decide how the land will be used had been extinguished by inconsistent rights. Where that right has not been extinguished, the description of the title as a possessory title will still be appropriate.

The phrase to ‘speak for country’, adopted by the High Court in Ward from a submission put to them by Counsel for the Second Applicants in that case, was an abbreviated description of evidence presented that there was a traditional law or custom that certain people within the society had a right to ‘speak for’, in the sense of make and communicate decisions about and/or be asked for and grant permission as to entry onto or access to or activities upon, areas of the land or waters. As the majority judges explained, their understanding was that: ‘Speaking for country is bound up with the idea that, at least in some circumstances, others should ask permission to enter upon country or use it or enjoy its resources’. The right to speak for country amounts to a comprehensive interest in land.

3 Exercise of Exclusive Rights

If Aboriginal traditional law and custom supports an exclusive right, then an ‘effective exercise’ of that right is not required to be proved in order for the right to exist.

B Extinguishment of Right to Control Access

It is arguable that, whereas grants which are inconsistent with an absolute right to control access completely extinguish that right, grants of other valid interests such as pastoral leases and statutory rights of regulation do not.

The majority of the High Court in Ward expressed views that a right in others to engage in activities or control the use of an area will extinguish a native title right to exercise the power to ‘decide how the land could or could not be used’. The decision of the High Court is to the effect that

\[ \text{[References omitted for brevity]} \]
the grant of access or other rights to others will mean that at least some native title rights to exclusive possession or to control or prevent the access of others would be permanently extinguished. However, it is arguable that the ratio of the decision does not require all rights to control or prevent access to be extinguished nor, if there is only a single right to control or prevent access rather than a group of rights, does it require that right to control or prevent access to be completely (as opposed to partially) extinguished. It is suggested that only the native title rights that are inconsistent with the grant of other rights or titles should be extinguished and that where native title rights could still coexist with those other grants, native title rights continue to exist.

This is based on the principle set out in cases such as Wik Peoples v Queensland and Fejo v Northern Territory which was accepted by the High Court in Ward, to the effect that where pursuant to statute there has been a grant of rights to third parties, the question which arises is whether the rights are inconsistent with the alleged native title rights and interests. Where the rights are inconsistent, there will be extinguishment to the extent of the inconsistency, and if they are not inconsistent, there will be no extinguishment.

The loss of the absolute right to control and regulate access which is expressed as a 'right to exclusive possession, occupation, use and enjoyment' does not necessarily preclude the continuation of such vestiges of rights to control or regulate access to or presence on an area as are not inconsistent with rights asserted by or granted by the executive. A general native title right to make decisions about land, control access to land or control the use of resources of the land which would be inconsistent with rights of or emanating from the British sovereign and the successor to the British sovereign would be extinguished, but more limited rights of that kind which do not compete with rights of, or emanating from, the Crown would not have been extinguished.

For example, in the case of a grant of a pastoral lease that does not amount to a Category A past act, the rights obtained under such a lease are limited. It is essentially a right to occupy the land for pastoral purposes. It does not, for instance, confer the right to exclude all others or to carry out non-pastoral commercial activities (e.g. to build a factory or to mine, etc.). It would be inconsistent for the native title holders to retain the right to exclude pastoralists or their staff or licensees from carrying out pastoral activities in the area, and any such right is extinguished. However, there is no inconsistency with the native title holders retaining the right to control

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107 [2002] HCA 28, [82], [78].
or prevent the access of other people (eg trespassers or developers) who are not exercising rights appurtenant to the pastoral lease or any other interest granted. In this situation, on the principles set out above, the right or rights to control access of such people would not be extinguished. It is suggested that any dicta in Ward about the extinguishment of the right to control access should not be read as indicating that rights to control access are completely extinguished, but rather, that they are only partially extinguished or that some rights of control only are extinguished.

The same analysis and principle should apply to the effect of such interests as mining tenements or the creation of reserves or other non-exclusive possession acts that are not specifically subject to the non-extinguishment principle, ie that there is only partial extinguishment of the rights or right to control or prevent access, and this extinguishment is limited to those inconsistent rights of control.

In Yarmirr, for example, the High Court upheld the trial judge’s determination that, although a right to possess the sea country claimed as against non-members of the claimant group had been extinguished in that case, the right to grant permission to use and enjoy the country as against non-members of the claimant group had survived.108

The High Court said in Ward that once a general right of control of access has been extinguished by the grant of a pastoral lease that right remains extinguished.109 Such a general right does not require further extinguishment upon the termination of a pastoral lease or upon the subsequent creation of a reserve. However, that does not mean that it follows that a right which is not inconsistent with any right held under a pastoral lease is extinguished. Therefore, a right stipulated which comprises a right to control access of persons other than those who may enter pursuant to a pastoral lease is not inconsistent with a pastoral lease and is not extinguished by the grant of a pastoral lease.

Any generally expressed right to control access would not be affected by the creation of a reserve following the grant of a pastoral lease, because that right would already have been extinguished. However, pastoral leases and reservations each extinguish only such native title rights as are inconsistent with the rights created by the grant of the pastoral lease and the reservation. The rights to control access vested by the pastoral lease or the reservation can only be such as are necessary for giving effect to or exercising rights pursuant to such purposes. A native title right expressed so as avoid any conflict or competition with the rights arising from a

108 Yarmirr (2001) 184 ALR 113, [86], [83].
109 [2002] HCA 28, [222].
pastoral lease or a reservation will not be extinguished by the operation of the common law, as the High Court has expressed it to operate in Ward.\textsuperscript{10}

The partial extinguishment of the right to control access to an area does not depend upon the identity of the grantee, but upon the rights granted and the specific inconsistency of such rights with native title rights. The Crown's title does not expand to 'a larger title to the land' by the grant of a pastoral lease than is necessary to grant the rights accorded by a pastoral lease.\textsuperscript{11}

The grantee of a pastoral lease has a bundle of rights under the grant including the rights to invite persons onto the lease area (as an incident of the use for pastoral purposes) and transfer the lease to others (subject to the statutory limitations on transfer set out in ss 115 and 115A of the Land Act 1933 (WA)). The exercise of the right to transfer the lease is not a future act; it is the exercise of a right inherent in the grant. What is transferred is the same interest which is created by the grant. It is merely held by a different person or entity. Section 106(1) of the Act reserves rights from what is granted by a pastoral lease to the Minister. Paragraph (f) reserves a right to the Minister to depasture horses, etc, 'together with a right for any person to pass over' certain parts of the land 'on all necessary occasions'. The provision indicates what is not included within the grant of a pastoral lease. It does not confer a right in the public, as against the world, to pass over the land. It does not determine what native title rights may exist in relation to the land. As the High Court concluded in Ward, the reservation under a pastoral lease confirm only that a pastoral lease does not grant a right to exclude native title holders from the land and the exercise of native title rights was not unauthorised or unlawful on a pastoral lease.\textsuperscript{12}

The High Court in Ward, when speaking of rights of access arising under mining leases,\textsuperscript{13} is again addressing the conflict of that right with a general native title right to control access and reiterating its conclusion that such right would have previously been extinguished by a grant of a pastoral lease. The Court is not addressing less generally-expressed rights, which do not impact on rights of access arising under grants.

In Yarmirr it was held that there could not be a native title right to 'exclude from any part of the claimed area all others'\textsuperscript{14} and that the native title right cannot be expressed (as it was by the claimants in that case) as 'competing' but qualified so that 'such rights may not be exercised so as to
impair or impede inconsistent rights. The conclusion of the High Court in *Yarmirr* was that a generally-expressed right to exclude cannot exist subject to a qualification as to the exercise of that right. However, that does not mean that a native title right which existed prior to sovereignty may not have been extinguished in part by inconsistency with another right arising from the new sovereign power, so that the right which remains is a part, only, of the previously existing right. So long as the right claimed is to that part of the right which is not inconsistent with the right emanating from the sovereign, then such right may be recognised by the common law.

The High Court in *Ward*, when speaking of the executive (by the act of designating land as a reserve for a public purpose) taking to itself and asserting the right to say how the land could be used, is saying nothing more remarkable than that native title holders could not also have the same power because it would be inconsistent with the Crown’s exercise of that power. The Court acknowledged that native title holders would have continuing entitlement to use the land. An entitlement to use the land necessarily involves continuing decision-making about the use of land, except that such decision-making cannot be of a kind which is inconsistent with the decision the Crown has made to dedicate it to a particular public purpose.\(^{116}\)

**C Control of Access to the Seas**

The sovereignty of the Crown impinges on any citizen’s right to have absolute control over access to the seas. However, the Crown’s powers in relation to the seas are limited by the common law public rights of fishing and navigation and the international law right of innocent passage. The Crown would thus appear not to have a general right to control access to the seas. The legislature may vest and has vested in the Crown and its servants and agents powers to regulate behaviour on and within the territorial seas. It remains open, therefore, for the common law to recognise native title rights to control access to or behaviour of persons on the seas which are not inconsistent with the common law rights of fishing and navigation, the international right of innocent passage and the exercise by the Crown of statutory powers of regulation of behaviour on the seas.

**D Exclusivity and the Inter-tidal Zone**

In *Ward*, what was said was:

\(^{113}\) Ibid [95] (emphasis added).

\(^{116}\) [2002] HCA 28, [219].
If the evidence otherwise established that the claimants had, under traditional law and custom, an exclusive right to fish in tidal waters, that exclusivity has been extinguished ... As has been explained in the joint reasons in Commonwealth v Yarrirr, there is a fundamental inconsistency between a native title right and interest said to amount to a right to occupy, use and enjoy waters to the exclusion of all others and public rights of navigation over and fishing in those waters. Likewise, there is a fundamental inconsistency between the public right to fish in tidal waters and an exclusive right to fish those waters.

As can be seen from the dictum, the High Court has made the position clear as to an exclusive right to fish in tidal waters, but has left open the position in relation to the exposed foreshore of the inter-tidal zone at low tide.

The High Court held in Yarrirr, and confirmed in Ward, that a native title right to ‘exclude from any part of the claimed area all others (even those who exercise [the public rights to navigate and to fish] or the right of innocent passage)’ in relation to tidal waters or the seabed below the low water mark cannot be recognised by the common law.\(^{118}\) Equally the native title right cannot be expressed as ‘competing’ but qualified so that ‘such rights may not be exercised so as to impair or impede’ inconsistent rights of fishing, navigation and innocent passage.\(^{119}\) In other words, a generally expressed right to exclude cannot exist subject to a qualification as to the exercise of that right. However, that does not mean that a native title right which existed prior to sovereignty may not have been extinguished in part by inconsistency with another right arising from the new sovereign power, so that the right which remains is a part, only, of the previously existing right.

The Full Federal Court said in Yarrirr:

The public right to fish and ancillary rights (e.g., bait-digging, the taking of shell-fish or worms [for bait] for the purpose of exercising the public right to fish) may be exercised on the foreshore. [However, that does not extend to a right to take bait from the foreshore for commercial or other purposes] (see Anderson v Alnwick DC [1993] 3 All ER 613; Adair v National Trust [1998] NI 33).\(^{120}\)

Any native title right which existed prior to the assertion of British sovereignty which competed with that right, or controlled the exercise of that right, was extinguished upon the assertion of sovereignty. However,

\(^{117}\) Ibid [388].

\(^{118}\) Yarrirr (2001) 184 ALR 113, [17], [76], [94]; Ward [2002] HCA 28

\(^{119}\) Ibid [95] (emphasis added).

\(^{120}\) (1999) 168 ALR 426, [201].
any right to control access for the purpose of engaging in other activities was unaffected.

In *Blundell v Catterall*\(^{121}\) it was held that there is no common law right to bathe upon the seashore or to pass over it for that purpose. The Court pointed out in *Yarmirr* that the property in the seashore, being the space between the ordinary high and low water mark, is prima facie in the Crown. Property in the seashore may, however, by grant or prescription be in the subject.\(^{122}\) The Court also noted that there is no general right to offload goods or merchandise on the shore, bank or ripa or traverse the same for the purpose of unlading.\(^{123}\) It follows from the reasoning in that case that general public rights of access to the seashore do not exist at common law.

The Court in *Fitzharding v Purcell* affirmed that:

> the bed of the river and the foreshore when covered with water are in fact parts of the sea, all rights which the public have on the sea attaching to the foreshore as the tide comes in and covers it...[I]t does not follow that in the sea below the ebb and flow of the tide the public have rights other than the rights of fishing and navigation and rights ancillary thereto.\(^{124}\)

**According to Halsbury’s Laws of England:**

The ownership of the foreshore and the bed in tidal waters is determined by the same rules as the ownership of the seashore is ascertained and prima facie the soil of the foreshore and the bed is vested in the Crown on the presumption that it is the waste of the kingdom which has not been granted.\(^{125}\)

Such title of the Crown is the radical title which may be burdened by a native title.\(^{126}\) Native title may, therefore, exist as a burden on the Crown’s title in relation to the seashore and native title rights and, if the traditional laws and customs support such rights, may include the same right which would apply to the holder of a grant or prescriptive right to control access of persons except those exercising existing common law rights incidental to the public right to fish or rights of navigation or innocent passage.

The same situation applies in relation to the right of navigation. In *Gann v Free Fishers of Wanstable* it was held that:

> The bed of navigable rivers where the tide flows and reflows, and of all estuaries or arms of the sea, is by law vested in the Crown. But this ownership

\(^{121}\) (1821) BB & Ald 268, 106 ER 1190.

\(^{122}\) (FFC) (1999) 168 ALR 426, 1304.

\(^{123}\) Ibid [313].

\(^{124}\) (1908) 2 Ch 139, 166.


\(^{126}\) *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 50, 52.
of the Crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from, or interfere with the right of navigation, which belongs by law to the subjects of the realm. The right to anchor is a necessary part of the right of navigation, because it is essential for the full enjoyment of the right. If the Crown, therefore grants part of the bed or soil of an estuary or navigable river, the grantee takes subject to the public right, and cannot in respect of his ownership of the soil make any claim or demand, even if it be expressly granted to him, which in any way interferes with the enjoyment of the public right. 127

The public right of navigation includes all such things as are incidental to such navigation, including, for example, the temporary dropping of a vessel's normal anchor, but does not include the laying of permanent moorings. 128

Therefore, where under the traditional laws and customs of the native title holder, the native title holder has a right to control access to the foreshore, that right was extinguished upon the assertion of British sovereignty as against a person exercising the public rights which comprise and are incidental to the right of navigation and the public right to fish. Subject to that extinguishment, what is not affected in respect of that right by extinguishment continues.

As the High Court in Ward suggested, the expression of rights in common law form may often incorporate allusions to or connote consequences which are not apposite to and 'mask' the true relationship between the native title rights and interests and other interests in relation to the determination area. 129 The determination can rectify that by paying 'close attention to the statement of “the relationship” between the native title rights and interests and the “other interests” relating to the determination area'. 130 The relationship of rights may be expressed, for example, in relation to the inter-tidal zone in a manner which reflects the public right to fish and engage in activities incidental to fishing, while still acknowledging the traditional law which provides that the exposed inter-tidal zone is part of an estate and to present times is regarded among the Aboriginal society of the area as within the authority of those traditionally affiliated with an estate to give permission to access and take anything from that area. That right has, since the introduction of the common law into the area, not existed in relation to members of the public exercising rights incidental to the public right to fish. The determination can be expressed in a way that reflects that.

127 (1865) 11 ER 1305, 1312.
129 [2002] HCA 28, [53].
130 Ibid.
E Confirmation of Access to Seas and Beaches

The oceans and seas are considered the common heritage of humanity in international law. Consequently, they are not subject to the exclusive jurisdiction of any nation. However, in the interest of public order, safety and security, a limited jurisdictional regime has been conferred on littoral states in international law, which includes the territorial seas, the contiguous zone and the exclusive economic zone (EEZ).\textsuperscript{131}

Legislation pursuant to s 212 of the \textit{NTA} which confirms 'existing public access to and enjoyment' of waterways, beds, banks and foreshores of waterways, coastal waters or beaches, confirms only access which is proved as a matter of fact to exist. There must be evidence in the particular case to prove such public access or enjoyment.

The public are not prohibited at common law from exercising rights of fishing and navigation and innocent passage, but do not have any general right of access in circumstances where the rights of others are contrary to public access to or enjoyment of an area. In \textit{Blundell v Catterall} it was held that there was no 'common law right for the King's subjects to bathe on the seashore, and to pass over it for that purpose on foot, with horses and carriages, notwithstanding the part on which the right claimed is, as to its soil, vested in a particular individual'.\textsuperscript{132} In \textit{Fowley Marine (Emsworth), Ltd v Gafford}\textsuperscript{133} it was held that there was no common law right to lay or maintain moorings in another person's land without his permission. In \textit{Lord Fitzhardinge v Purcell}\textsuperscript{134} it was held that the public have no rights over the foreshore of a tidal navigable river, when it is not covered by the tide, except as are ancillary to their rights of fishing and navigation in the sea. The right claimed in that case to go upon the foreshore as a member of the public, in exercise of a general right of all the King's subjects, to kill and carry away wild duck was rejected.

F Non-exclusive Resources

A right to receive a portion of resources appropriated by others, if expressed in such general terms, will necessarily be inconsistent with exclusive rights to resources which are held by the Crown and grantees of the Crown or pursuant to the common law. However, a right to receive a

\textsuperscript{132} (1821) BB & Ald 268, 106 ER 1190.
\textsuperscript{133} [1967] 2 All ER 472, 480.
\textsuperscript{134} [1908] 2 Ch 139.
portion of resources may manifest in the traditional laws and customs of Aboriginal peoples within the region and may be legitimate as between those who do not have inconsistent rights, in relation to particular resources or otherwise, pursuant to the common law, statute or the Crown’s prerogative.

G Mining and Exclusive Possession

The High Court in Ward emphasise: ‘grant of exclusive possession for mining purposes is directed at preventing others from carrying out mining and related activities on the relevant land’ and that the right to exclude may be exercised in a way which would prevent the exercise of some relevant native title right or interest for so long as the holder of the mining lease carries on that activity (emphasis added) in relation to ‘some parts (even, in some cases, perhaps the whole) of the leased area. That is not to say, however, that the grant of a mining lease is necessarily inconsistent with all native title.’ The Court is, in that passage, drawing a distinction between an effect on the exercise of rights for a period of time and the extinguishment of those rights.

On this basis, there is no reason to suppose that native title rights may not continue to exist on the area of a mining lease to the full extent established by the evidence, subject to the right of the holder of a mining lease to prevent the exercise of native title rights for so long as that is necessary for the ‘meaningful exercise’ of the right to use the area for mining purposes. This would necessarily be inconsistent with a general native title right to control access to the area. Section 44H of the NTA would apply so that an activity done in accordance with the mining lease would prevail over any native title rights and interests and any exercise of those rights and interests, but would not extinguish those rights and interests; the existence and exercise of the native title rights and interests would not prevent the doing of the act, either.

1 Residence

Given the analysis of the High Court in Ward, there is no reason to suppose that a right to camp or build a permanent residence within the area of a mining lease will necessarily be inconsistent with the grant of a mining lease. It is a matter of public knowledge that the vast majority of mining leases are only ever used for exploration. Often only part of the area of a lease may ever be used for exploratory activity or extraction of

135 [2002] HCA 28, [308].
136 Ibid [309].
137 Ibid [308].
minerals and associated activity, and the area occupied for the purposes of mining operations at any one time may be a small proportion of the total lease area.

2 Water
The right of a mining lessee to take water pursuant to s 85(1)(c) of the Mining Act 1978 (WA) is not an exclusive right to take water. Like the other rights granted, it is a right to take so much water as may be necessary for the meaningful exercise of the right to mine.138

3 Hunting
The grant of a mining lease is not necessarily inconsistent with or even necessarily likely to prevent the exercise of the right to hunt. Whether or not mining operations under a mining lease will eradicate species desired to be hunted is a matter of fact which may vary according to the nature and extent of the mining operations taking place in the leased land. The use of weapons for hunting must, of course, be a use which is consistent with the general law, ie, a weapon must not be used in circumstances which infringe the various criminal law provisions as to its use and civil liability might be attracted in respect of negligent use. However, common experience in mining areas suggests that there are vast areas of land which are the subject of mining leases where hunting of all kinds could be pursued without any risk of violating the criminal law or attracting civil liability or interfering with mining activity as a result of the use of a weapon for hunting (whatever the character of the weapon).

H Easement or Licence
An easement or licence is analogous to a reserve or a pastoral lease or mining lease, in the sense that it is an interest with which native title rights and interests other than the right to control access may co-exist.139 Co-existence implies reasonable exercise of the respective rights of the interest holders.140 For example, a right which a native title holder may have to use the land, in accordance with a traditional custom, may include burning the dead grass to rejuvenate the land for the next season. If the holder of an easement in relation to the same land had a right pursuant to that easement to transport gas along the area of the easement and the manner of transportation of the gas was such that it might not be in a container which

138 Ibid.
139 Ibid [221], [178], [415], [296]-[309], [322]-[342]
was sufficiently sealed, sunk below ground or otherwise constructed in such a way as to protect it from fire hazards, including naturally occurring bushfires, (which is most unlikely) then it would seem not to be a reasonable use of the area for the native title holders to light a fire in the vicinity of the gas. That does not extinguish the native title right to light a fire in all other circumstances upon the area of that easement.

1 Public Work
The dedication of a place for 'public work' (as defined in s 253 of the NTA) creates an easement or a licence in such land and operates to extinguish native title in relation to the land or waters on which the public work is constructed, established or situated and adjacent land or waters the use of which is necessary for, or incidental to, the construction, establishment or operation of the work (but not necessarily on the whole of the area of the easement or licence).141

2 Improvement
In the case of such co-existing interests, the lawful placement or erection of improvements on an area the subject of an easement or licence may prevent the exercise of some native title rights or interests for so long as the holder of the easement or licence maintains that improvement in situ for the purpose of exercising rights under the easement or licence.142

I Non-Exclusive Trade

A right to trade in a resource is a right appurtenant to the right to take the resource. The right to the resource need not be exclusive in order for it to be tradable. A right to trade is synonymous with the right of alienation and embraces the right of native title holders, which may be regulated by traditional law, the common law or statute law. For example, there is considerable statutory regulation of fishing, particularly commercial fishing. The activity of fishing by native title holders who possess a traditional right to take fish is subject to such regulation.143 The decisions of the High Court in Yarmirr and Ward do not preclude this characterisation of the activity of resource trading under traditional law and custom.

141 NTA s 251D; Ward [2002] HCA 28, [223].
142 Ward [2002] HCA 28, [308].
143 See Yanner v Eaton (1999) 166 ALR 258.
VI Coexistence on Pastoral Leases and Reasonable User

Just as other co-existing rights, the co-existence of residency rights with other rights must be governed by the principle of reasonable user of the land, identified by the Full Federal Court in Ward. In the same way that a pastoralist may have more than one residence upon a pastoral lease which does not interfere with the use of the area for the purposes of the lease, native title holders may do likewise. Circumstances may arise regarding the appropriate manner of exercise of traditional rights in a way which will not interfere with the pastoralist’s use of the land, which would be resolved by application of the principle of reasonable user. By way of example, in the same way that the exercise of the right to hunt may not be reasonably exercised in chasing kangaroos through the pastoralist’s homestead by discharging firearms, a permanent residence may not, for example, be reasonably placed in such a location as to cut off the access of stock to grazing pasture or a water source necessary for their subsistence. However, the mere existence of the permanent residence of a native title holder (or numerous native title holders) on a pastoral lease may have no conceivable impact on the use of thousands of hectares of land for pastoral purposes.

A right to build a house and live on the land and otherwise occupy the land will be perfectly consistent and co-exist with rights under a pastoral lease. However, as a matter of reasonable exercise of the rights, they must not be exercised in such a manner as to conflict with the pastoralist’s rights, and vice versa. A similar principle applies to the pastoralist. A pastoralist has a right to build a dam on the pastoral lease. In theory it can be built on any part of the pastoral lease. The whole pastoral lease could be covered by dams, leaving no place for a native holder to exercise any rights of hunting or residence. Such use would not, however, be a reasonable use of the land for pastoral purposes. A reasonable use would be to build dams in places of maximum catchment, yielding reasonable quantities of stored water to sustain stock. Such reasonable use would not be inconsistent with the exercise of co-existing native title rights.

VII Inconsistency and Section 44H

The High Court in Ward said:

Two rights are inconsistent or they are not. If they are inconsistent, they will be extinguished to the extent of the inconsistency; if they are not, they will not be extinguished. Absent particular statutory provisions to the contrary,
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Suspensions of one set of rights in favour of another do not arise. (emphasis added.)

Section 44H of the NTA specifically decrees that a requirement for permission in relation to the doing of an activity and the doing of an activity in accordance with a lease prevail over native title rights and interests, 'but do not extinguish them'. If it is not the case that improvements on leases do not extinguish native title at common law, then s 44H is a 'particular statutory provision to the contrary' which mandates the suspension and non-extinguishment of native title rights in relation to activities comprising improvements pursuant to a lease. (The position in relation to public works is distinguishable because of the specific provisions of ss 229(4), 223B(7) and 251D of the NTA, which apply to public works.)

A Consistent Right to Burn

Burning, if it was to destroy pasture, would be inconsistent with a pastoralist's interest. However, the exercise of a right to burn may, in some terrain, rejuvenate pasture or may be contained to a particular area so as to have no effect on pasture, and so may continue as a native title right because it does not create any inconsistency with another's rights.

B Use of Reserves and Inconsistency

The creation and use of a reserve does not determine extinguishment of native title. Use of a reserve, by itself, cannot amount to an effective assertion of beneficial ownership of a reserve. The High Court in Ward said that the only effect of designation of land as a reserve for a public purpose is that it is 'inconsistent with any continued exercise of a power by native title holders to decide how the land could or could not be used'. Their Honours continued: ‘The designation of land as a reserve for certain purposes did not without more, create any right in the public or any section of the public which, by reason of inconsistency and apart from the State Validation Act, extinguished native title rights and interests’. It is only when a 'public work' is constructed or established on a reserve, under the power in the Public Works Act, pursuant to the purpose for which it was created, that any further extinguishment of native title occurs in relation to the land or waters on which the public work is constructed, established or

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145 Ward [2002] HCA 28, [82].
146 Ibid [215].
147 Ibid [219].
148 Ibid.
situated and adjacent land or waters the use of which is necessary for, or incidental to, the construction, establishment or operation of the work.\footnote{\textit{Yarmirr v Northern Territory} (2001) 184 ALR 113, [96].} If a reserve is lawfully used in a way which does not entail the construction of a public work, then the use may prevent the exercise of some native title rights for so long as the use continues.\footnote{Ibid [124].}

C Heritage Protection

Olney J in \textit{Yarmirr v Northern Territory}\footnote{[1998] FCA 771, [162].} found that a claimed right to protect places of cultural and spiritual importance was made out. His Honour said in this regard that, according to the traditional laws and customs of the community, community members have rights and obligations in relation to sites within the claimed area, which they are required to protect from unauthorised and inappropriate use.\footnote{Ibid [125].} His Honour determined:

There are strict and complex rules of access and behaviour at many of these dangerous sites which, if observed properly, will protect visitors and others from supernatural danger. It is the duty of the senior \textit{yuwurrumu} male to ensure that people are aware of these rules and behaviours and, to protect both them and others from the dire consequences that can flow from inappropriate behaviour.\footnote{Ibid [124].}

A right to protect places of importance, in so far as it suggests a general right to control access, may be expressed in more specific terms which do not result in a conflict with the rights of others.

Protection of a place of importance may occur by means other than those based upon a right of exclusive possession or control of access to the claim area. The High Court in \textit{Yarmirr} reasoned that 'the tension between, on the one hand, the rights to "occupy, use and enjoy the waters of the determination area to the exclusion of all others" and "to possess" those waters to the exclusion of all others ... and, on the other, the rights to fishing navigation and free passage is self-evident'.\footnote{\textit{Yarmirr} (2001) 184 ALR 113, [96].} Their Honours note, however, that 'neither the public right to navigate, nor the right of innocent passage require free access to each and every part of the territorial sea'.\footnote{Ibid.}

\footnote{\textit{Yarmirr} s 251D.}

\footnote{See Ward [2002] HCA 28, [308].}

\footnote{See \textit{NTA} s 251D.}
The High Court in Ward suggested that where, as in this case, ‘according to traditional law and culture, there is a right to control access to land, or to make decisions as to its use, but that right is not an exclusive right’, then 'it requires close attention to the statement of “the relationship” between the native title rights and interests and the “other interests” relating to the determination area’.

Giving that close attention to the relationship between the native title right and other rights, the native title right may thus be more fully described, for the purposes of a determination in accordance with s 225 of the Act, as:

A right to maintain, conserve and/or protect by all reasonable lawful means places and objects located within places within the area of cultural and spiritual social, cultural, religious, spiritual, ceremonial, ritual or cosmological significance to the common law native title holders, under traditional laws, customs and practices, from use or activities which are unauthorised or inappropriate use or activities, in accordance with the traditional laws and customs of the native title holders, provided that the native title holders shall have provided all relevant persons by all reasonable means with information as to such uses, and such persons are able to comply with the requirements of those traditional laws and customs while engaging in reasonable use of the area in accordance with the statutory or common law rights to which such persons may be entitled.

A right to protect a place may be exercised in a number of ways other than by controlling access to the place. The protection can be effected in much the same way that Aboriginal sites are protected under the Aboriginal Heritage Act 1972 (WA). That Act operates without controlling access to any place. It puts visitors on notice that to excavate, destroy, damage, conceal or otherwise alter an Aboriginal site is prohibited. A person may be prosecuted for contravening the prohibition. A register of sites is maintained which enables the public to be aware of the sites where such behaviour is prohibited. The manner in which the prohibition is most frequently adhered to is by the preventative measure of any party, who apprehends that an act may contravene the prohibition, entering into an agreement with the Aboriginal group with an interest in the matter. This agreement directs the party’s behaviour in a way which leads to avoidance of the prohibited acts. A similar process is capable of implementation by a native title holding group. Appropriate public notice could be exhibited in relation to the existence of sites with indications as to the kind of behaviour which would breach the right to protect the site. Enforcement of the right would be effected by resort to available civil law remedies.

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156 Ward [2002] HCA 28, [53]. See s 225(d) of the NTA.
157 Section 17. The Aboriginal and Torres Strait Islander Heritage Protection Act 1976 (Cth) also prohibits desecration of a place.
158 Aboriginal Heritage Act 1972 (WA) s 38.
including proceedings for damages or injunctive relief. The approach of entering into heritage protection agreements (currently common practice) with mining companies and developers is another way of exercising the right to protect places of significance to native title holders.

VIII VESTING OF A RESERVE

A The Land Act

It is arguable that the High Court in Ward, without the benefit of full argument from the parties on the topic, erroneously interpreted s 33 of the Land Act (WA) as authorising the passing of a legal estate in fee simple to any person or body in whom land was 'vested' under that provision. The High Court indicated in Ward that native title rights and interests would be extinguished to the extent of their inconsistency with rights under any extinguishing act. The High Court confirmed, however, that mere reservation of land, such as for a National Park, would not extinguish native title rights to use the land according to traditional laws and customs of the native title holders, but a continuing power of native title holders to decide how the land could or could not be used would be inconsistent with the executive designating the land as a reserve for a public purpose. In the absence of any earlier acts that extinguished that right, an act would impinge on native title within the meaning of s 227 of the NTA. If an act affecting native title was created after 31 October 1975 and before 1 January 1994, it would be a category D past act, to which the non-extinguishment principle applies.

The point bears repetition that the vesting of control and management in a person or body does not extinguish all other interests. The majority judgment of the High Court in Ward did not articulate any reason for inferring that vesting land in a person or body for a purpose by exercise of a statutory power passed a common law legal estate in fee simple.

139 [2002] HCA 28, [82].
160 Ibid [219].
161 Ibid [222].
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simple in that person or body. The reasons for judgment made no reference to, but might have been influenced by, s 23B(3) of the NTA, which states:

If:

(a) by or under legislation of a State or Territory, particular land or waters are vested in any person; and

(b) a right of exclusive possession of the land or waters is expressly or impliedly conferred on the person by or under the legislation;

the vesting is taken for the purposes of paragraph (2)(c) to be a vesting of a freehold estate over the land or waters.

That provision, being a deeming provision, cannot determine the common law position although it would appear to reflect the common law as the High Court has concluded it to be, in relation to the interests it was considering. The statutory provision also depends on the question of law, that is, whether the right of exclusive possession is conferred by the relevant legislation or not.

The conclusion that a vesting conferred a legal estate or fee simple title was reached even though the majority identified that s 33 of the Land Act 1933, as amended by the Land Act Amendment Act 1948, limited the power of the vestee to lease the land. It is submitted that the provision is suggestive of something less than an estate in fee simple being held by the vestee.

The terms of s 33 are considerably expanded, however, by the 1948 amendment, and differ. The amendment provides in s 33(2) that the Governor may direct that land shall vest in and be held by a person for the purpose for which it is reserved, and the Governor may confer on the vestee power to lease for the purpose the whole or part of the land, subject to such conditions and limitations as the Governor shall deem necessary to ensure that the land is used for that purpose. The 1933 version of the section, in addition to declaring that the Governor might direct that the reserve ‘vest in’ a municipality, road board, body corporate, or person to be named in the order, also provided that the Governor direct that the reserve be ‘held...in trust’. The amended form of the section deletes the reference to the reserve being held in trust. It is contended that the legislature intended, by the deletion of those words in the amendment, to provide for a vesting which did not comprise a trust.

163 A distinction was drawn between vesting land and placing a reserve under the control of a board of management under s 34, but that distinction does not mitigate against any inference as to the nature of the rights accorded by a vesting under s 33.
Section 33(3) provides an alternative power in the Governor to direct the leasing of the land for the purpose for which the land has been reserved, with a similarly constrained power in the lessee to sub-lease only with the consent of the Governor.

Section 33(4) provides a further alternative power in the Governor to direct that land be granted in fee simple to a person subject to a condition that the grantee shall not lease or mortgage the land without the consent of the Governor and subject to such other conditions and limitations as the Governor shall deem necessary to ensure that the land is used for the purpose for which it is reserved. The fact that the legislature has provided in three separate subsections for the vesting of land, the leasing of land and the granting of land in fee simple is suggestive of the conclusion that the legislature did not regard the vesting of land to be of the same effect as a grant in fee simple. If the s 33(2) vesting amounted to a grant in fee simple, then s 33(4) would be superfluous as all the powers would be covered in s 33(2).

The majority judgment in Ward also did not take account of the degree of 'precariousness' which attaches to a vested reserve:

(a) which was classified as a B class reserve, which remains 'reserved from alienation or from otherwise being dealt with unless and until the Governor cancels such reservation by notice in the Gazette' or

(b) which was classified as B or C class reserve and where the Governor was empowered to cancel the reservation, change the boundaries of or amend the purpose of the reserve, upon publishing notice of the same in the Gazette.

'B The Land Administration Act

Under the Land Administration Act 1997 (WA), which repealed the Land Act 1933 (WA), an order under s 33 of the repealed Act subsists as if it were a management order under the new Act. No distinction is drawn under the new Act between an order resulting in a vesting, a lease or a grant in fee simple pursuant to s 33 of the repealed Act. The contrast which the majority judgment draws between the vesting of reserve land to be held in trust, pursuant to s 33, and the placing of a reserve 'under control',

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164 Land Act 1933, s 31(2).
165 Land Act 1933, s 37.
166 The Court did not refer to the Land Administration Act 1997 in its reasons.
167 Land Administration Act 1997, sched 2, clause 16(1).
of any municipality, road board, body corporate, or persons as a board of management’ is eliminated under the new Act. It suggests that the legislature never intended the distinction between (1) a vesting on trust and (2) a placing ‘under control’ of a person or body of a piece of land to have different legal effects.

The responsible Minister, under the new Act, has power to revoke the management order where the management body agrees, or does not comply with its management order or with its management plan or does not submit a management plan when requested by the Minister or where the Minister considers that it is in the public interest. Where the management order is revoked because the Minister considers it is in the public interest, the management body may claim compensation for any improvement on the reserve made in accordance with the management order. Any other ground for revocation would appear not to attract any right of compensation. A management order is beset by a significant degree of ‘precariousness’ and the holder of a management order is a mere agent of the Crown, managing land for the Crown for a particular purpose. The management body does not hold a legal title equivalent to a fee simple grant.

C The Conservation and Land Management Act

In the case of national parks, the Conservation and Land Management Act 1984 (hereinafter ‘CALM Act’) provides that land vested in the Authority under the Land Act 1933 or a national park under the CALM Act or under the National Parks Authority Act 1976, ss 17(1) or 18 is declared to be vested in the Authority only for the purposes set out in several subparagraphs of s 22(1) Those provisions deal with developing policies, considering alterations to the vesting, management plans, monitoring management, providing advice and causing research to be undertaken for the purposes of policy development. The intention to be gleaned from the provisions of the CALM Act applicable to the vesting of a national park is that it is not intended to vest legal title by exclusive possession in the National Parks and Conservation Authority. Exclusive

169 Pursuant to the Land Administration Act 1997, s 49(2).
170 Section 50(1) and (2).
171 Conservation and Land Management Act (hereinafter ‘CALM Act’) s 5(g).
172 CALM Act s 5(c).
173 CALM Act s 7(3).
174 CALM Act ss 22(3), (2) and 7(2).
175 CALM Act s 22(1) (b), (c), (d), (e), (h), (i).
possession by the Authority would be inconsistent with the capacity to exercise some native title rights and interests in national parks.

D The Racial Discrimination Act and Category D Past Act

It is also arguable that the vesting of a reserve in the Crown or a statutory authority of the Crown after the passage of the Racial Discrimination Act (‘RDA’) is a category D past act and does not extinguish native title.

The majority in Ward held that a Crown to Crown grant in the form of a lease to the Conservation Land Corporation of the Northern Territory was not a Category B past act because it fell within the exception to the definition of Category B past act in s 230(d)(i). It is, therefore, a category D past act. A Crown to Crown grant for a national park or the preservation of the natural environment is not a previous exclusive possession act. The non-extinguishment principle applied. Why this was so could not be determined on the findings of fact.176

The Court, on the other hand, held that the vesting of lands in reserves for particular purposes under s 33 of the Land Act 1933 (WA), in a Minister of the Crown, a statutory authority or a local authority, was not a 'past act', because the vesting was not rendered invalid by the RDA. The majority judgment concluded that s 10 of the RDA merely provided a right of compensation.177 This conclusion places no weight upon the fact that if any form of title, other than that held by the racial group which holds native title in Western Australia, existed in relation to the land, no act of vesting the land under s 33 of the Land Act 1933 could occur. No other form of title could be extinguished by an act of vesting pursuant to section 33. No question of compensation would arise as a consequence of a vesting in relation to any other form of property. If section 10(1) of the RDA is truly to have the effect of giving native title holders 'security in the enjoyment of their property “to the same extent” as persons generally have security in the enjoyment of their property’,178 then the statutory provision could not be held to be validly capable of authorising a vesting which had the result of extinguishing native title. A law which thus purports to authorise expropriation of property held by native title holders, when it would not operate to expropriate any other property interest, would be inconsistent with s 10(1) of the RDA and thus invalid to that extent, by

176 Ward [2002] HCA 28, [448]–[450].
177 Ibid [253], [108].
If that is so, then, contrary to the conclusion of the majority judgment, a vesting under s 33 of the Land Act 1933 would be a 'past act' under the NTA. It would not be a 'category A past act', either, because it does not fit within any category in the definition of that term or because it is a Crown to Crown grant (if it is inferred to be a grant of a freehold estate) within the terms of s 229(2)(b)(i) of the NTA. It would be a 'category D past act', to which the 'non-extinguishment principle' would apply.

In the case of the creation of a nature reserve and its vesting in a person or body corporate pursuant to the Land Act 1933 and the Conservation and Land Management Act 1984, no reserve can be created or vested in relation to land which is the subject of a property interest of any person other than a native title holder. If it is desired to create and vest a reserve in relation to land which is the subject of any other property interest, then the land must first be resumed or acquired by the Crown, in accordance with statutory processes which provide for the giving of notice and payment of compensation to the property holder. The creation of a nature reserve over land which is the subject of native title rights and interests, without any notice to the native title holder or compensation for the acquisition of the same would be tantamount to an arbitrary expropriation and deprivation of property. The statutory provisions which authorise that process, to that extent, inconsistent with the RDA and consequently invalid as a result of the operation of s 109 of the Commonwealth Constitution, in relation to acts pursuant to that statutory authority which have occurred since the enactment of the RDA.

The grant of any leases, licences, permits or authorities over land or creation of any management plan pursuant to its status as a nature reserve which interferes with the exercise of any native title right which existed prior to the creation or vesting of a nature reserve since 31 October 1975 would also be invalid by virtue of the RDA and s 109 of the Commonwealth Constitution.

The acts authorised by the CALM Act 1984 and Land Act 1933 which occurred between 31 October 1975 and 1 January 1994 are 'past acts' within the definition of s 228 of the NTA. Such acts are validated by the State Validation Act (cf sections 15 and 19 of the NTA). An act of creation of a reserve is a category D past act and so subject to the non-extinguishment principle in s 238 of the NTA; its effect is to suspend the exercise of any native title rights inconsistent with such statutory rights. This is because the body in whom the reserve is vested may have to

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179 See Ward majority judgment, [2002] HCA 28, [113], referring to WA v Commonwealth (1995) 183 CLR 373, 437 ("Native Title Act Case").

180 See NTA ss 232, 15(d) and 238.
control access to or activities on the reserve during the currency of the existence of the reserve. Any further act of vesting a reserve in a person or body corporate (even if it had the effect of ‘vesting’ or ‘passing’ of ‘a legal estate in fee simple’ is not ‘the grant of a freehold estate’ within the terms of s 229 of the NTA. Therefore, it is not a category A past act. Alternatively, where it is a grant by the Crown to the Crown in any capacity, it is not a category A past act because of the effect of s 229(3)(d)(i) of the NTA. If it is not a category A past act, then it is a category D past act and the non-extinguishment principle applies. Any lease of any portion of a nature reserve would be a category B past act, which would extinguish native title rights to the extent of any inconsistency with the rights in the lease. Any licence, permit, authority or management plan, however, would be a category D past act and subject to the non-extinguishment principle.

IX RESUMPTION AND THE RACIAL DISCRIMINATION ACT

The High Court in Ward confirmed the view of the Full Federal Court that a notice of resumption pursuant to the Public Works Act 1902 directing that land be vested in the Crown for an estate in fee simple, freed from all other interests, extinguished native title. The High Court held that the Public Works Act s 18 provided no different treatment of native title rights and interests from the treatment of other rights and interests in the land and no inconsistency between s 18 of the Public Works Act and the RDA arises.

The High Court in Ward also confirmed the conclusion of the Full Federal Court that the resumption of land for a public purpose does not extinguish native title. The Court said that a resumption of land by the Crown, per se, vests in the Crown title no larger than the ‘radical title’ it acquired at sovereignty. It does not give any right or title to the land. If the resumption is completed by an acquisition notice which in its terms goes further in declaring that the land resumed is vested in the Crown ‘for an estate in fee simple in possession’, or otherwise makes clear that ‘the interest that was to be created by the resumption was an estate in fee

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182 Ibid [203]-[204], [280].
184 Ward [2002] HCA 28, [278].
185 Ibid [208].
186 Ibid.
simple then that is an act which, subject to the effect of the RDA, would extinguish native title.

The High Court differed from the Full Federal Court in expressing the view that ‘looking to the use that has actually been made of land distracts from the central inquiry which is an inquiry about rights created in others or asserted by the executive, not the way in which they have been exercised at any time’. The High Court in Ward found that a resumption under s 18 of the Public Works Act provided no different treatment of native title rights and interests from the treatment of other rights and interests in land and it is not suggested that the practical operation of that Act resulted in the different treatment of native title rights and non-native title rights. That being so, no question of inconsistency between s 18 of the Public Works Act and the RDA arises.

The High Court noted that the notice and compensation provisions were in general terms. The majority judgment was to the effect that, if the notice provisions did not apply to native title holders (because, arguably, they do not fit within the definition of ‘owners’ or ‘occupiers’ of land in s 17(2)(c) of the Public Works Act), then s 10(1) of the RDA would take effect.

A Resumption, Vesting and the Racial Discrimination Act

The resumption of land by the Crown, if valid, has no extinguishing effect on native title. It does not give the Crown any larger title to the land than the radical title acquired at sovereignty. If native title is not affected by a resumption, then the RDA is not triggered. However, any subsequent act to the resumption, such as a vesting, is an act which could not be done if any title except a native title existed over the area. It is, therefore an act which deprives native title holders of a property right in circumstances where no other property holder is deprived of the enjoyment of any right. It is, consequently, an act, pursuant to State law which is inconsistent with s 10

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187 Ibid [205].
188 Ibid [234].
189 WA v Ward (2000) FCR 316, [419].
190 Ward [2002] HCA 28, [234].
191 Ibid [278].
192 Ibid [279].
193 Ibid [208].
of the RDA and invalid, as a consequence of the operation of s 109 of the Commonwealth Constitution.\footnote{Ibid [108] (situation (iii)).}

**B Use of Reserve**

The use of a reserve does not effect extinguishment of native title.\footnote{Ibid [215].} Use of a reserve, by itself, cannot amount to an effective assertion of beneficial ownership of a reserve. As the High Court said,

> The designation of land as a reserve for certain purposes did not without more, create any right in the public or any section of the public which, by reason of inconsistency and apart from the State Validation Act, extinguished native title rights and interests.\footnote{Ibid.}

It is only when a 'public work' is constructed or established on a reserve, by authority of power conferred by the Public Works Act, pursuant to the purpose for which it was created, that any further extinguishment of native title occurs in relation to the land or waters on which the public work is constructed, established or situated and adjacent land or waters the use of which is necessary for, or incidental to, the construction, establishment or operation of the work (and does not necessarily comprise the whole of the area of the reserve).\footnote{Ibid [223]; NTA s 251D.}

**C The Racial Discrimination Act & the WA Mining Act**

The provisions of the Mining Act 1904 (WA) and the Petroleum Act 1936 (WA) have been held by the High Court in \textit{Ward} \footnote{[2002] HCA 28, [377]-[384].} to vest minerals and petroleum in the Crown. However, the Court came to that conclusion without considering the effect of s 9(2) of the Mining Act 1978 (WA). That section provides that:

> Notwithstanding anything in this Act or any previous enactment the owner, grantee, lessee or licensee of, or other person entitled to, any land to which this section or any corresponding provisions apply, that is not the subject of a mining tenement, is entitled to use any mineral existing in a natural state on or below the surface of the land for any agricultural, pastoral, household, road making, or building purpose, on that land.
Native title holders are ‘entitled to’ the land in relation to which the native title is found to exist. They are therefore entitled to use any mineral, including ochre (proclaimed to be a mineral on 12 May 1920) for the purposes set out in s 9(2). The right to use a mineral for a ‘household’ purpose is a right to use it for domestic or day-to-day living purposes. Upon a broad reading of that concept, that would include use by members of a community, with a community entitlement to the land, of ochre for community purposes such as for ceremonial decoration, and would include the gift, exchange or trade of ochre within the community or with neighbouring communities for similar purposes, consistent with the traditional laws and customary practices of the native title holding community. If the ordinary meaning of the term could not be expanded to such uses, then s 10 of the RDA would extend the enjoyment of that property right, available to non-Aboriginal racial groups who primarily hold rights and exercise property rights as ‘households’, to those Aboriginal racial groups who hold and exercise property rights as a community, thus allowing the use of minerals, including ochre, for communal purposes.

The High Court in Ward held that it cannot be said that mining leases are necessarily inconsistent with the continued existence of native title rights and interests; however, some native title rights and interests would necessarily be extinguished in relation to some areas of a mining lease. Their Honours noted that the native title right to control access to the land is inconsistent with and extinguished by the right of access arising under a mining lease.

The High Court in Ward observed that the majority of the Full Federal Court in Ward held that any native title right or interest to hunt or gather over land in a nature reserve created before 1975 was extinguished and special leave to challenge that finding was refused. The holding of the Full Federal Court in Ward, however, was that where nature reserves or wildlife sanctuaries have been created after the RDA came into force, s 211 of the NTA would, by force of s 109 of the Commonwealth Constitution, override the provisions of s 23 of the Wildlife Conservation Act 1950 (WA), and the native title right to take fauna would not be wholly extinguished. They concluded that the RDA would apply because the creation of the nature reserves and wildlife sanctuaries had had a much greater impact on native title holders in the area concerned than on other Australians, who at most held common law rights to hunt game.

199 Ibid [296].
200 Ibid [309].
201 WA v Ward (2000) 99 FCR 316, 446 [504].
The Full Federal Court in *Ward* held that ss 104–106 of the *Conservation and Land Management Act 1984* (WA) and regulations under the *Wildlife Conservation Act 1950* (WA), while imposing 'very stringent and extensive control over human activities within nature reserves and wildlife sanctuaries', do not prevent the continued enjoyment of all native title rights and interests in relation to the land within them; however, the provisions do extinguish an 'exclusive native title right to control access' and an 'exclusive right of possession and occupancy'.

The High Court in *Ward* indicated that the RDA has an impact in relation to a nature reserve created after 31 October 1975. Their Honours also indicated that native title rights and interests are 'property' and are protected by the RDA as 'the human right to own and inherit property (including the right to be immune from arbitrary deprivation of property)'.

In *Ward* reference was made by the High Court to the Native Title Act Case for the propositions that, where security of enjoyment of property is more limited for the persons of a particular race than it is for others, s 10(1) of the NTA gives that security to the same extent enjoyed by others and carries immunity from arbitrary deprivation of that property. Quoting from the Native Title Act case, their Honours confirmed that

> If a law of a State provides that property held by members of the community generally may not be expropriated except for prescribed purposes or on prescribed conditions (including the payment of compensation), a State law which purports to authorise expropriation of property held by the 'persons of a particular race' for purposes additional to those generally justifying expropriation or on less stringent conditions (including less compensation) is inconsistent with s 10(1) of the [RDA].

As the High Court pointed out, 'the conclusion that the State law provided for differential treatment of land holding according to race, colour or national or ethnic origin was critical' in reaching a conclusion of direct inconsistency between the State law and the RDA.

In *Ward* the majority judgment of the High Court suggested:

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203 *WA v Ward* (2000) 99 FCR 316, [506]–[508]. See however the argument above in relation to partial extinguishment of the right to control access.

204 [2002] HCA 28, [247].


206 [2002] HCA 28, [113].


208 *Ward* [2002] HCA 28, [113].

209 Ibid.
it is at least arguable that the Act's requirement that notice be given to 'owners' and 'occupiers' of land [Public Works Act, s 17(2)(c)] did not extend to native title holders. If that were the better construction of the Act, although we doubt that it is, s 10(1) of the RDA would, as a matter of federal law, supply such a right.210

The conclusion reached in Ward was that s 18 of the Public Works Act, which results in conversion of interests in land into a claim for compensation upon publication of the notice of resumption under s 17(1), was not inconsistent with the RDA. The resumption would thus not be invalid, and would not be a 'past act', within the terms of the NTA.211

The High Court in Ward followed Mabo (No 1) and the Native Title Act Case and held that native title cannot be treated differently from other forms of title because its characteristics are different.212 Their Honours pointed out (following a dictum of Mason J in Gerhardy v Brown)213 that where a State law extinguishes only native title, leaving other titles intact, it is depriving a person of a particular race of a right and 'the discriminatory burden of extinguishment is removed because the operation of the State law is rendered invalid by s 109 of the Constitution'.214 The High Court identifies the 'rights' to be compared as 'the human right to own and inherit property (including a human right to be immune from arbitrary deprivation of property).215 In relation to mining leases the High Court point out that if native title holders 'do not, under the WA Mining Act, enjoy their rights and interests ... to the same extent as holders of other forms of title, s 10 of the RDA is engaged'.216

Under s 123 of the Mining Act 1978 (WA) the 'owner' and 'occupier' of land the subject of mining operations are entitled to compensation for loss or damage resulting from or arising from the mining. An inclusive description of what may be compensated makes reference to matters related to deprivation of possession or use of any part of the land.217 The Mining Act (WA) does not contemplate that the property of an 'owner' or 'occupier' is extinguished by the grant of a mining lease. Indeed, s 27 provides for the making of an application for a mining tenement in respect

210 Ibid [201].
211 Ibid [280].
212 Ibid [117]–[122].
215 Ibid [116].
216 Ibid [311].
217 Mining Act 1978 (WA) s 123(4).
of ‘private land’. Further, the statutory compensation provisions provide a remedy for a statutorily sanctioned trespass in relation to property interests. Section 113 of the WA Mining Act further states: ‘Where a mining tenement expires or is surrendered or forfeited, the owner of the land to which the mining tenement related may take possession of the land forthwith...’.

The High Court held that native title holders are not ‘owners’ within the definition of that term in the WA Mining Act where their right to control access to the land had been extinguished by the prior grant of a pastoral lease over the same area, and that the RDA was not violated by that consequence because it would apply to any other property interest which did not include the right to control access.

The majority found it unnecessary to reach any conclusion as to whether native title holders are ‘occupiers’, within the definition of that term in the WA Mining Act, but concluded that if native title holders are ‘occupiers’ then they are entitled to compensation under the WA Mining Act and the RDA would not be engaged. Their Honours said:

Therefore, there would be no invalidity in respect of the mining leases, and to the extent that the grant of those mining leases extinguished native title, that native title would remain extinguished.

It is arguable that the Court did not appear to consider the fact that the consequence of extinguishment of native title is not a consequence which applies to any other property interest by the grant of a mining tenement and that the RDA would, therefore, be engaged to rectify the resulting discrimination. Consistent with what the Court said at [108], if the grant of a mining lease extinguishes native title to any extent, then ‘the discriminatory burden of extinguishment is removed because the operation of the State law is rendered invalid by s 109 of the Constitution’.

The majority considered the alternative hypothesis that the holders of native title cannot properly be described as ‘occupiers’, and concluded that, in that circumstance, s 10 of the RDA is engaged. They concluded that s 10 of the RDA would operate to confer the same right of compensation on native title holders as would apply to ‘occupiers’. They point out

218 ‘Private Land’ is defined in s 8 of the Mining Act 1978 (WA). The definition includes an estate of freehold and any lease (not being a pastoral lease).
220 Ibid [318].
221 Ibid [319].
222 Ibid [320].
that when the RDA operates in this way, the validity of the mining leases is
unaffected, as is the extinguishing effect that those grants may have on native
title. The grants did not, therefore, constitute category C past acts. The result
is that to the extent that the grants of the respective mining leases
extinguished native title, that native title is extinguished and in place thereof,
the holders of that native title have a statutory entitlement to compensation
...223

It is arguable that this conclusion, while bringing native title into line with
‘occupiers’ in respect of compensation for trespass in relation to their
property interests, omits to apply the same remedy provided by the RDA of
removing ‘the discriminatory burden of extinguishment’ from the native
title holders which does not apply to other property interests.

Their Honours poignantly noted that since

no basis is suggested in the Convention or the RDA for distinguishing
between different types of property and inheritance rights, the RDA must be
taken to proceed on the basis that different characteristics attaching to the
ownership or inheritance of property by persons of a particular race are
irrelevant to the question whether the right of persons of that race to own or
inherit property is a right of the same kind as the right to own or inherit
property enjoyed by persons of another race.224

It is arguable, on the basis of that reasoning, that, during the period of
operation of the RDA, native title cannot be extinguished by the grant of a
mining lease if it does not have that effect in relation to other forms of
property ownership.

The availability to native title holders of a right of compensation
applicable to ‘occupiers’ of land under s 123 of the Mining Act 1978
(WA), in respect of what would otherwise be tortious acts of trespass and
damage to a property interest, does not make the deprivation of property
by permanent extinguishment of native title any less arbitrary.

Section 10 of the RDA might come closer to providing security of
enjoyment of property to native title holders to the same extent as is
enjoyed by other property holders if it operated to confirm that native title
holders have the same right to resume exercise of their rights and interests
upon the expiration, surrender or forfeiture of a mining tenement as has
‘the owner of land to which the mining tenement related’ under s 113 of
the Mining Act 1978. That provision either declares the legal position
which would otherwise exist in relation to ‘the owner of land’ affected by
a mining tenement, or creates a statutory right which applies to property
owners generally pursuant to s 10 of the RDA.

223 Ibid [321].
224 Ibid [121].
In the absence of such a statutory mechanism for eliminating the discriminatory burden of extinguishment, the provision of the Mining Act 1978 authorising the grant of a mining tenement and extinguishing native title would seem invalid because of its inconsistency with the RDA. The statutory provision would be validated as a category D past act and any mining lease granted pursuant to it would be validated as a category C past act to the extent such act affected native title. The non-extinguishment principle set out in s 238 of the NTA would apply to the statutory provision and the grant.

In Ward, the majority judgment of the High Court suggested it was 

at least arguable [see WA v Commonwealth (1994-95) 183 CLR 373, 447] that the Act's requirement that notice be given to 'owners' and 'occupiers' of land [Public Works Act, s 17(2)(c)] did not extend to native title holders. If that were the better construction of the Act, although we doubt that it is, s 10(1) of the RDA would, as a matter of federal law, supply such a right.225

The conclusion reached was that s 18 of the Public Works Act, which results in the conversion of interests in land into a claim for compensation upon publication of the notice of resumption under s 17(1), was not inconsistent with the RDA.226 The resumption would thus not be invalid, and would not be a 'past act', within the terms of the NTA.

CONCLUSIONS

The High Court in Yarmirr declared that the common law was not limited to the low water mark in recognising native title, but set a limit on recognition of rights which would be inconsistent with international law rights and general common law offshore rights. This paper puts the argument that generally expressed exclusive native title rights of the type claimed by the native title holders in Yarmirr may be inconsistent with those international and common law rights; however, without being inconsistent with international and common law rights, more precisely expressed rights based upon traditional laws and customs may impact on the behaviour of others in a limited way.

The High Court in Ward emphasised the importance of following the words of the NTA in making an approved determination of native title, rather than attempting to draw a definition of native title from the common law cases. Native title was affirmed as comprising a bundle of rights, and a detailed analysis was made of the inconsistency between certain native title rights claimed and numerous forms of grant and statutory right. This

225 Ibid [201].
226 Ibid [280].
paper puts a view that there are number of areas where the analysis of the High Court might be revisited, particularly in relation to issues of the application of the RDA, the right to control access and the effect of vesting of a reserve.

The Yorta Yorta case has provided a contentious analysis of the relationship between the common law and the source of the traditional laws and customs upon which native title rights and interests are based. It dwelt on the need to focus on norms, and the facts that laws emanated from a body of people and that norms are subject to change. The case discounted the need to present all the manifestations of a society of people and focused on the normative system and its impact on the rights and interests of groups in relation to land and waters.

The form of application for a determination of native title set out in the schedule below attempts to encapsulate all that is required to be stated in an application for a determination of native title following the recent decisions of the High Court under review here, taking into account the provisions of the NTA and the recent decision of Justice Lindgren in Wongatha227 which deals with an application to amend an application for a determination of native title.

Schedule

NATIVE TITLE DETERMINATION
CLAIMANT APPLICATION
(FORM 1)

Name of the Applicant:

..............................................................

Definitions

In this Application the following words shall have the following meanings set out hereunder:

Application area means the area covered by this application as described in Schedule B;

227 Harrington-Smith on behalf of the Wongatha People v Western Australia (No 5) [2003] FCA 218.
Area A means land within the application area that is landward of the high water mark and which comprises:

(i) areas of unallocated Crown land (including islands) that have not been previously subject to any grant by the Crown,

(ii) areas to which section 47 of the Native Title Act 1993 applies,

(iii) areas to which section 47A of the Native Title Act 1993 applies,

(iv) areas to which section 47B of the Native Title Act 1993 applies; and

(v) other areas to which the non-extinguishment principle, set out in section 238 of the Native Title Act, applies and in relation to which to there has not been any prior extinguishment of native title.

Area B means land or waters within the application area that are not within Area A and which comprise:

(i) land and waters which are subject to a non-exclusive pastoral lease;

(ii) areas of Crown Land (including islands) that have been set aside as Crown reserves, but are not vested in a person or body corporate to be held in trust, or otherwise, for a specified purpose pursuant to section 33 of the Land Act 1933 (WA) other than those described in Area C;

(iii) land and waters which are subject to a mining lease as defined in s 245 of the Native Title Act 1993 (Cth);

(iv) any area which, at the time of the application, is:

(a) not covered by a freehold estate or a lease, but

(b) covered by a reservation, proclamation, dedication, condition, permission or authority, made or conferred by the Crown in any capacity, or by the making, amendment or repeal of legislation of the Commonwealth or a Territory, under which the whole or a part of the land or waters in the area is to be used for a public purpose or for a particular purpose; or

(c) subject to a resumption process (as defined in s 47B(5)(b) of the Native Title Act); and

(v) any area which, at the time of the application, is:

(a) not covered by a freehold estate or a lease;

(b) not covered by a reservation, proclamation, dedication, condition, permission or authority, made or conferred by the Crown in any capacity, or by the making, amendment or repeal of legislation of the Commonwealth or a Territory, under which the whole or a part of the land or waters in the area is to be used for a public purpose or for a particular purpose;
(c) not subject to a resumption process (as defined in s 47B(5)(b) of the Native Title Act); and

(d) no member of the native title claim group occupies the area when this application is made.

**Area C** means land and waters within the application area which are not within Area A and which comprise land and waters which are a ‘nature reserve’ or ‘wildlife sanctuary’ (as those terms are defined in the Wildlife Conservation Act 1950 (WA)) created before 31 October 1975.

**Significant** means having social, cultural, religious, spiritual, ceremonial, ritual or cosmological importance or significance to the common law native title holders connected to the area under traditional laws, customs and practices of the Aboriginal society to which they belong.

All words used in this application which are defined in the Native Title Act 1993 (Cth) bear the same meaning as in that Act, or the meaning in the Native Title (Effect of Past Acts) Act 1995 (WA), where that meaning differs from the meaning in the NTA, unless the context dictates otherwise.

### A. Details of the claim

1. The Applicant applies for a determination of native title under subsection 61(1) of the Native Title Act 1993.

2. The Applicant is entitled to make this application as the people named as the Applicant are authorised by the native title claim group to make the native title determination application and deal with all matters arising under the NTA in relation to the Application.

3. The schedules to this application contain the following information:

**Schedule A** [see Act, s 61]

The claim is brought on behalf of the people listed in Attachment ‘A’.

**Schedule B** [see Act, s 62]

The external boundaries of the area of land and waters covered by the application are as set out in the map attached and are set out in the document entitled ‘Description of External Boundary’ which is annexed as Attachment ‘B’.
Areas of land and waters within those boundaries that are not covered by the application

(1) Subject to (4), the Applicant excludes from the area of land and waters covered by the application any areas that are covered by any of the following acts as these are defined in either the Native Title Act 1993 (Cth), as amended (where the act in question is attributable to the Commonwealth), or Titles (Validation) and Native Title (Effect of Past Acts) Act 1995 (WA), as amended, (where the act in question is attributable to the State of Western Australia) at the time of the Registrar’s consideration:

• Category A past acts
• Category A intermediate period acts
• Category B past acts that are wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests
• Category B intermediate period acts that are wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests.

(2) Subject to (4), the Applicant excludes from the area of land and waters covered by the application any areas in relation to which:

• a 'previous exclusive possession act', as defined in section 23B of the NTA, was done and the act was an act attributable to the Commonwealth; or
• a 'relevant act' as that term is defined in section 121 of the Titles (Validation) and Native Title (Effect of Past Acts) Act 1995 (WA) was done and the act is attributable to the State of Western Australia; or
• a 'previous exclusive possession act' under section 23B(7) of the NTA was done in relation to the area and the act was attributable to the State of Western Australia.

(3) Subject to (4), the Applicant also excludes from the area of land and waters covered by the application areas in relation to which native title rights and interests have otherwise been wholly extinguished.

• The area of land and waters covered by the application includes any area in relation to which the non-extinguishment principle (as defined in section 238 of the Native Title Act 1993) applies, including any area to which sections 47, 47A and 47B of the NTA apply, particulars of which will be provided prior to the hearing but which include such areas as may be listed in Schedule L.
Notwithstanding anything contained elsewhere in this application (including the attachments to it), the Applicant excludes from the area of land and waters covered by the application those areas of land and waters that were excluded from the area of land and waters included in the original application in WAG 6096 of 1998, as at 4 June 1996.

Schedule C [see Act, s 62]
A map showing the boundaries of the area covered by the application is annexed as Attachment 'C'.

Schedule D [see Act, s 62]
The Applicant does not have details of any searches that have been carried out to determine the existence of any non-native title rights and interests in relation to the land or waters in the area covered by the application.

Schedule E [see Act, s 62]
Subject to laws and customs
The native title rights and interests claimed in this application are subject to and exercisable in accordance with:
1. the common law, the laws of the State of Western Australia and the Commonwealth of Australia; and
2. valid interests conferred under those laws, and
3. the body of traditional laws and customs of the Aboriginal society under which rights and interests are possessed and by which native title claim group have a connection to the area of land and waters the subject of this application.

Area A rights
The native title rights and interests in relation to Area A comprise:
(1) The right to possess, occupy, use and enjoy the area as against the world;
(2) A right to occupy the area;
(3) A right to use the area;

228 Paragraphs (1) to (5) adopt suggestions for drafting set out in the reasons for judgment of Lindgren J in Wongatha, at [12]-[17]. [28].
A right to enjoy the area;

A right to be present on or within the area;

A right to be present on or within the area in connection with the society's economic life;

A right to be present on or within the area in connection with the society's religious life;

A right to be present on or within the area in connection with the society's cultural life;

A right to hunt in the area;

A right to fish in the area;

A right to make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;

A right to make decisions about the use of the area by persons who are not members of the Aboriginal society to which the native title claim group belong;

A right to make decisions about the enjoyment of the area by persons who are members of the Aboriginal society to which the native title claim group belong by persons who are members of the Aboriginal society to which the native title claim group belong;

A right to make decisions about the enjoyment of the area by persons who are members of the Aboriginal society to which the native title claim group belong by persons who are not members of the Aboriginal society to which the native title claim group belong;

A right of access to the area;

A right to live within the area;

A right to reside in the area;

A right to erect shelters upon or within the area;

A right to camp upon or within the area;

A right to move about the area;

A right to engage in cultural activities within the area;

A right to conduct ceremonies within the area;

A right to participate in ceremonies within the area;

A right to hold meetings within the area,

A right to participate in meetings within the area,

A right to teach as to the physical attributes of the area;
(27) A right to teach as to the significant attributes of the area;
(28) A right to teach upon the area as to the significant attributes of the area;
(29) A right to teach as to the significant attributes within the area of the Aboriginal society connected to the area in accordance with its laws and customs;
(30) A right to control access of others to the area;
(31) A right to control access of others to the area except such person as may be exercising a right accorded by the common law, statute law of the Commonwealth or the State of Western Australia or a lawful grant by the British sovereign or its successor;
(32) A right to take resources, other than minerals and petroleum, used for sustenance from the area;
(33) A right to take resources, other than minerals and petroleum, used for sustenance within the area;
(34) A right to gather resources, other than minerals and petroleum, used for sustenance within the area;
(35) A right to use and/or enjoy resources, other than minerals and petroleum, for sustenance within the area;
(36) A right to use and/or enjoy resources, other than minerals and petroleum, for food, on, in, under or within the area;
(37) A right to use and/or enjoy resources, other than minerals and petroleum, for shelter, on, in or within the area;
(38) A right to use and/or enjoy resources, other than minerals and petroleum, for healing, on, in or within the area;
(39) A right to use and/or enjoy resources, other than minerals and petroleum, for decoration, on, in or within the area;
(40) A right to use and/or enjoy resources, other than minerals and petroleum, for social purposes, on, in or within the area;
(41) A right to use and/or enjoy resources, other than minerals and petroleum, for cultural, religious, spiritual, ceremonial and/or ritual purposes, on, in or within the area;
(42) A right to take fauna;
(43) A right to take flora (including timber);
(44) A right to take soil;
(45) A right to take sand;
(46) A right to take stone and/or flint;

(47) A right to take clay;

(48) A right to take gravel;

(49) A right to take ochre;

(50) A right to take water;

(51) A right to control the taking, use and enjoyment by others of the resources of the area, including for the said purposes (set out at sub-paragraphs (32)–(41) above) and/or in the said form (set out at sub-paragraphs (42)–(50) above), other than minerals and petroleum and any resource taken in exercise of a statutory right or common law right, including the public right to fish;

(52) A right to manufacture from and trade in the said resources of the area, upon or within the area, other than minerals and petroleum, including the manufacture of objects, materials or goods for sustenance, and/or food, shelter, healing, decoration, social, cultural, religious, spiritual, ceremonial and/or ritual purposes and/or including objects, materials or goods in the form of tools, weapons, clothing, shelter and/or decoration;

(53) A right to receive a portion of the said resources (other than minerals and petroleum) taken by other persons who are members of the Aboriginal society from the area;

(54) A right to receive a portion of the said resources (other than minerals and petroleum) taken by other persons other than those who are members of the Aboriginal society from the area;

(55) A right, in relation to any activity occurring on the area, to

   (i) maintain

   (ii) conserve and/or

   (iii) protect

   significant places and objects located within the area, by preventing, by all reasonable lawful means, any activity which may injure, desecrate, damage, destroy, alter or misuse any such place or object;

(56) A right, in relation to any activity occurring on the area, to

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229 'Ochre' has been proclaimed as a 'mineral' pursuant to the Mining Act 1904 (WA). An issue may arise as to whether all the colouring used for ceremonial decoration comes from a mineral form. Sometimes colouring is taken from plants.

230 'Stone' is not mentioned in the definition of "minerals" in the Mining Act 1978 (WA); probably because it is a whole form, which is not usually what is extracted by mining.
(i) maintain 
(ii) conserve and/or 
(iii) protect 

significant ceremonies, artworks, song cycles, narratives, beliefs or practices by preventing, by all reasonable lawful means any activity occurring on the area which may injure, desecrate, damage, destroy, alter or misuse any such ceremony, artwork, song cycle, narrative, belief or practice;

(57) A right, in relation to a use of the area or an activity within the area, to:

(i) prevent any use or activity which is unauthorised in accordance with traditional laws and customs 
(ii) prevent any use or activity which is inappropriate in accordance with traditional laws and customs 

in relation to significant places and objects within the area or ceremonies, artworks, song cycles, narratives, beliefs or practices carried out within the area by all reasonable lawful means, including by the native title holders providing all relevant persons by all reasonable means with information as to such uses and activities, provided that such persons are able to comply with the requirements of those traditional laws and customs while engaging in reasonable use of the area and are not thereby prevented from exercising any statutory or common law rights to which that person may be entitled

(58) A right to enjoy all the features, benefits and advantages inherent in the environment of the area;

(59) A right of individual members of the native title holding group or groups to be identified and acknowledged, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area; and

(60) A right of the group or groups who hold common or group native title rights and interests to identify and acknowledge individual members of the native title holding group, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area.
Area B rights

The native title rights and interests which are claimed in relation to Area B are all the rights claimed above in relation to Area A, except the right to possess, occupy, use and enjoy the area as against the world and the rights set out in paragraphs (12), (14), (30), (31) and (51).

Area C rights

The native title rights and interests which are claimed in relation to Area C are all the rights claimed above in relation to Area A, except the right to possess, occupy, use and enjoy the area as against the world and the rights set out in paragraphs (12), (14), (30), (31) and (51) and the right to hunt, gather or take fauna, in so far as such right is contained within paragraphs (3), (4), (9), (10), (21), (32)–(42), (52) and (53).

Schedule F [see Act, s 62]

The native title rights and interests claimed exist on the following factual basis:

1. the native title group have an association with the area based on traditional laws which they acknowledge and traditional customs which they observe;

2. the predecessors of the native title claim group had an association with the area from a time prior to the assertion of British sovereignty in relation to the area;

3. the native title rights and interests are possessed under a body of traditional laws acknowledged and traditional customs observed by the native title claim group and their predecessors; and

4. the native title claim group have continued to hold the native title in accordance with those traditional laws and customs, including laws and customs which vest land and waters in the native title claim group on the basis of:
   a. descent from ancestors connected with the area;
   b. conception in the area;
   c. birth in the area;
   d. traditional religious knowledge of the area;
   e. traditional knowledge of the creation and geography of the area;
   f. traditional knowledge of the resources of the area;
g. knowledge of and participation in traditional ceremonies and rituals associated with the area.

Schedule G [see Act, s 62]
The members of the native title claim group currently carry out the following activities in relation to the land and waters:
1. hunting, gathering and fishing;
2. moving about, living, residing, erecting shelters and camping;
3. conducting and engaging in cultural activities, ceremonies, rituals, meetings and teaching of, maintaining, conserving and protecting the significant and physical attributes of the area and places, works and objects within the area;
4. taking resources from the area, including fauna, flora, soil, sand, stone, flint, clay, gravel, ochre, water for use and consumption for food, shelter, healing, decoration, cultural, religious, ceremonial and ritual purposes and for manufacture and trade of objects, materials and goods, in the form of tools, weapons, clothing, shelter and decoration.

Schedule H [see Act, s 62]
The other applications to the High Court, Federal Court or recognised State/Territory body that have been made in relation to the whole or a part of any area covered by this application and that seek a determination of native title or compensation in relation to native title are:

Schedule I [see Act, s 62]
Details of any notices under section 29 of the Act, of which the Applicant is aware, that have been given and that relate to the whole or a part of the area are annexed as Attachment ‘I’.

Schedule J
The applications are not unopposed.

Schedule K
The representative Aboriginal and Torres Strait Islander body for the area covered by the application is the .... Aboriginal Corporation.
Schedule L [see Act, ss 47, 47A, 47B and 61A]

The Applicant does not have details of:

(a) any area for which a pastoral lease is held by or on behalf of the members of the native title claim group; and

(b) any area leased, held or reserved for the benefit of Aboriginal peoples or Torres Strait Islanders and occupied by or on behalf of the members of the native title claim group; and

(c) any vacant crown land occupied by the members of the native title claim group; and

(d) any area mentioned in paragraph (a), (b) or (c) over which the extinguishment of native title is required by section 47, 47A or 47B of the Act to be disregarded.

Schedule R [see Act, s 190C – optional]

This application has been certified under s 203BE of the Native Title Act by the Aboriginal Corporation.

Schedule S

Details of the differences between the Application and the Application as amended:

1. Name of the Applicant

An amendment has been made to this schedule to remove the name ‘…….’ from the name of the Applicant. 231 Amendments have also been made to this schedule to remove references to the term ‘Applicants’ and replace them with the term ‘the Applicant’ (see s 61(2)) and to add the words ‘and deal with all matters arising under the NTA in relation to the Application’ at the end of paragraph 2.

2. Schedule A

An amendment has been made to this schedule to remove the name ‘…….’. 232

3. Schedule B

An amendment has been made to Attachment ‘B’ ‘Description of External Claim Boundary’ to reflect that the eastern external boundaries of the

231 If any such change has been made.
232 If any such change has been made.
claim have been pulled back to remove an overlap with [Number and name of application].

An amendment has also been made to the description of the internal boundaries in accordance with the High Court’s decision in Western Australia v Ward (2002) 191 ALR 1.

Amendments have also been made to this schedule to remove references to the term ‘Applicants’ and replace them with the term ‘the Applicant.’

4. Schedule C

An amendment has been made to Attachment ‘C’, a map showing the boundaries of the area covered by the application, to reflect that the eastern external boundaries of the claim have been pulled back to remove an overlap with [Number and name of application].

5. Schedule D

Amendments have been made to this schedule to remove references to the term ‘Applicants’ and replace them with the term ‘the Applicant.’

6. Schedule E

An amendment has also been made to rights and interests claimed in accordance with the High Court’s decision in Western Australia v Ward (2002) 191 ALR 1.

7. Schedule F

An amendment has been made to the general description of the factual basis on which it is asserted that the native title rights and interests claimed exist in accordance with the High Court’s decision in Western Australia v Ward (2002) 191 ALR 1.

8. Schedule G

An amendment has been made to the description of the activities which the native title claim group currently carry on in relation to the land and waters to better reflect the High Court’s decision in Western Australia v Ward (2002) 191 ALR 1.

9. Schedule H

No change.

10. Schedule I

An amendment has been made to this schedule to bring it up to date.

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233 If any such change has been made.
234 If any such chang has been made.
Amendments have also been made to this schedule to remove references to the term ‘Applicants’ and replace them with the term ‘the Applicant.’

11. Schedule J
   No change.

12. Schedule K
   An amendment has been made to this schedule to delete the words ‘............’ and replace them with the words ‘............ Aboriginal Corporation’.

13. Schedule L
   An amendment has been made to this schedule to correct a typographical error and also to remove references to the term ‘Applicants’ and replace it with the term ‘the Applicant.’

14. Schedule R
   An amendment has been made to this schedule to reflect amendments made to the *Native Title Act 1993*. The words ‘Yamatji Land and Sea Council’ are replaced with the words ‘Yamatji Marlpa Barna Baaba Maaja Aboriginal Corporation’.

An amendment has been made to this schedule to reflect amendments made to the *Native Title Act 1993* (Cth).

235 If any change has been made to the NTRB for the area.