Recent Developments in Native Title Law Case Law

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I begin by acknowledging the Gadigal people of the Eora Nation, the traditional owners of this land. I thank President von Doussa and the legal section of the Human Rights and Equal Opportunity Commission for the invitation to contribute to today's seminar, and thank Commissioner Tom Calma for his introduction.

I have been asked to address recent developments in native title case law. I've decided to home in on three issues that have featured in recent Federal Court cases, which I'll refer to as 'Continuity', 'Connection' and 'The Group'. By recent cases I generally mean trial or appeal decisions handed down in the last two years, although a handful predate that. And I refer you to the handout which shows names, dates, the mob involved and the region of Australia affected. All of these cases (apart from the *De Rose* trial) post-date the High Court's test case decision

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on the claim by the Yorta Yorta people on the NSW/Victorian border in December 2002.

These current appeals and some of the recently decided ones give us an indication of where the law is going in the aftermath of *Yorta Yorta*. What is the Federal Court doing with the law bequeathed by the High Court in 2002? And if we see the High Court re-enter the fray soon, what questions are they likely to be addressing?

I will dwell briefly on what the High Court said in *Yorta Yorta* in 2002 to set up this discussion of the 2003-2007 decisions. But first I want to explain what I mean by these three concepts in deliberately general language, rather than the specific words used in the cases.

Continuity, along with extinguishment, is the big hurdle facing a native title claim under the law that's developed in Australia. The term continuity doesn't appear in the Native Title Act. The reason it's important, according to the High Court, is that it is closely allied to the word 'traditional' that does figure so prominently in the definition of what native title is. That definition is reproduced on the handout – it appears in section 223(1).

The requirement for continuity explains why so much native title litigation has a backward looking focus. A claimant group must present not just as the people for particular country today. They must show a very strong link back to the people in occupation of the country at the time the British Crown asserted sovereignty. And they must show the maintenance of a substantially *unbroken* link across the intervening 100 to 200 years or so. In rough terms, that's what Yorta Yorta said that use of the word 'traditional' entails.

Connection, by contrast, does appear in section 223(1). It's in paragraph (b). The main issue here is how do people establish to the court *they* are the right people for that country and have remained so throughout the period since colonisation. A key question in the courts is whether demonstrating an ongoing *physical* connection is required, through occupation or the exercise of particular rights or the use of land and waters in particular ways. Or, taking into account in particular the countless instances of dispossession in Australian history since 1788, whether the maintenance of another kind of connection is sufficient, in particular what is usually referred to as a spiritual connection to the land.

The final concept I want to talk about is the idea of **The Group**. To explain this I want to focus on the question that confronts

any gathering of Aboriginal or Torres Strait Islander people as they contemplate embarking on the pursuit of a native title claim. The question is, how do they choose to define themselves for the purposes of this claim?

It's a basic truth that all of us carry multiple identities. To take what I hope is not a completely inappropriate analogy: a non-Indigenous Australian living in Cairns may stress their individual identity in their workplace, their family memberhip at a ceremony like a wedding or funeral, their status as a far North Queenslander in discussing State politics, their allegiance to Queensland when a State of Origin football game is being played and their Australianness when travelling overseas.

Layers of identity are a basic truth about human existence. I'm not suggesting that when we turn to the formulation of a native title claim that Indigenous people make some arbitrary choice about identity. These claims can be expressions of the most fundamental aspects of people's sense of self and so my analogy is not intended to diminish the significance of landed identity or the weight of the decision-making at stake. But the reality is we do see diverse choices exercised by different groups across the country.

There are many explanations for that I suspect. One can read about region-wide, even possibly transcontinental, Dreaming tracks and the way responsibility for them is carried across country and passed on. One can absorb the lessons accepted way back in Mabo that rights in land can be layered not just between local groups and their neighbours, but within a group as amongst subgroups like clans or even individuals. There is, in other words, a sociological or anthropological explanation for this range of levels at which people might choose to pursue recognition.

There are also the inescapable pragmatics of the situation. The long and sometimes torrid experience of pursuing a native title claim against a government opponent and possibly many other taxes any group's internal resources. The group realistically needs a critical mass to survive those pressures. And there is of course the question of resourcing expensive claims. Native Title Representative Bodies are notoriously under-funded. They are required to make hard-headed economic decisions about return on money invested, while taking into account all the other non-financial considerations at stake in rationing out scarce money. The more people who will benefit, the greater the area encompassed by a claim, the better the economies of scale, within reason. Add to that the incentives built into the Act since the 1998 amendments. The government's campaign in support

of the amendments relied heavily on the phenomenon of overlapping claims. Changes to the Act encouraged and facilitated consolidation and amalgamation.

How then should the Federal Court and High Court respond to the variation in approaches that result? What have the courts said about group definition and in particular its relationship to the concept of an Aboriginal society given such prominence by the High Court in *Yorta Yorta*?

Yorta Yorta

After that introduction, I turn now to Yorta Yorta. As I've just said, populations can be grouped at different 'levels of resolution'[1] depending on the context. Many native title claims involve a contest between parties as to the appropriate level of 'aggregation'.

Since the High Court's decision in *Yorta Yorta*, this debate has been additionally shaped by the requirement that an Aboriginal 'society' was in existence at the date of sovereignty and that it has continued in existence to the present day.

By society, the High Court said it meant a body of people united in their observance of laws and customs – that is, in their

[1] Peter Sutton, *Native Title in Australia: An Ethnographic Perspective* (2003) 93.

maintenance of a ‘normative system’ or rules that govern behaviour. Those laws and customs – that normative system – are the source of the rights and interests in relation to land and waters that are known in Australia as ‘native title’.

But native title rights and interests will only be recognised today if they a) find their origin in a pre-sovereignty normative system that b) has had continuous vitality ever since. It is these latter two qualities which gives the laws and customs the requisite ‘traditional’ character.

In summary, the essential requirement to emerge from *Yorta Yorta* is the demonstration of *continuity*. That is, continuity of a society from sovereignty to the present, continuity in the observance of law and custom and continuity in the content of that law and custom. The degree of tolerable interruption to the observance of law and custom and to societal continuity, and the degree of tolerable adaptation and change to the content of law and custom have become key issues for Federal Court judges required to apply the law from *Yorta Yorta* since December 2002. So too has the focus on the concept of a society.

I will now address each of these three issues in turn, through the prism of some of the important recent cases.

Continuity

The reality is that there are very few if any Indigenous populations in Australia where you could say the impacts of colonisation have been less than profound. The Court in Yorta Yorta conceded that a precise correspondence between the society, the laws and the rights at sovereignty with those in existence today was unrealistic. So the judgment is punctuated by phrases and observations that qualify the requirement for absolute continuity. But there are real question marks over whether the High Court created a coherent set of continuity principles in that case, which Federal Court judges could apply with consistency.

In truth I suggest that when you read Yorta Yorta it is more like listening to two voices speak at the same time. The stern voice insists on a very high degree of correspondence between society, law and rights today and at sovereignty, and what you might call 'literal continuity' in the intervening period. The more liberal or tolerant voice moderates the requirements.

Some parts of the judgment insist there can be no new rights and that 'the only native title rights and interests in relation to land and waters which the new sovereign order recognised were

those that existed at the time of change in sovereignty' [55]. Elsewhere the majority joint judgment allows that the 'profound effects' of European settlement on Aboriginal societies have brought 'great' and 'inevitable' change to societal structures and practices.

The High Court also acknowledged that 'difficult questions of fact and degree may emerge' in assessing the question of adaptation and change. They said there is no 'single bright line test' and some change or adaptation or some interruption to the enjoyment of rights is not necessarily fatal to a native title claim. This acknowledgment of inherent subjectivity (or at least the requirement for fine judgment) and the reluctance to specify more detailed doctrinal limits in *Yorta Yorta* enhance the trial judge's autonomy in reaching his or her own conclusion about continuity on the evidence presented – a latitude that is also available to Full Federal Court benches.

And on that continuity issue we have seen cases go both ways – and I am referring here particularly to the two urban area cases decided last year: *Risk* (the unsuccessful Larrakia claim to parts of Darwin) and *Bennell* (the successful Noongar claim to the Perth metropolitan area). That divergence may be explicable by what's been called the 'fact-specific' nature of native title, the variations in history, culture, development and available

evidence in different parts of the country; by the evidence presented and the conduct of the case. There are many variables and it's wrong to be mechanistic in the way you look at them.

But I believe there is also the potential that underlying doctrine has played its part.

Wilcox J's basic finding in *Bennell* was that the 'current normative system is that of the Noongar society that existed in 1829, and which continues to be a body united, amongst other ways, by its acknowledgement and observance of some of its traditional laws and customs. It is a normative system much affected by European settlement; but it is not a normative system of a new, different society.'[2] The modifications to traditional law he observed were, in his view, within the parameters of acceptable change and adaptation set down by the High Court. While the trial judge and High Court majority in *Yorta Yorta* depicted a story of severance with the past followed by later revival, Wilcox J in *Bennell* depicts the story of the Noongar as essentially one of continuity and adaptation.

In the *Risk* case Justice Mansfield considered the evidence about the Larrakia and their connection to the Darwin area in three

[2] [2006] FCA 1243 [598]

periods: 1825 to about 1910, 1910 to WW2 and WW2 to 1970. The judge found a series of propositions to be true:

- The Larrakia were the society inhabiting the claim area at time of sovereignty or when the earliest European observations were made [110]
- '[T]hat society was the same society as existed at settlement and continued to exist up to the first decade of the 20th Century, …[and] it continued to enjoy rights and interests under the same or substantially similar traditional laws and customs as those which existed at settlement.' [803]
- '[T]he Larrakia people [today] are the same society as that which existed previously, including at settlement. There is no reason to think otherwise', he said, and he 'did not understand the respondents to contend otherwise.' [805]
- 'there is, and has been, a continuous recognition in the Darwin area of certain persons as Larrakia, both by self-identification and by community recognition.' [825]

But the judge found there was a 30 year window of time between WW2 and the modern day cultural revival which began around 1970 fatal to the claim. In that period he said that customary law observance became so attenuated that the link with the past was substantially interrupted. 'I have therefore

reached the conclusion [he said] that the Larrakia people, that is the present society comprising the Larrakia people, do not now have rights and interests possessed under the traditional laws acknowledged, and the traditional customs observed, by the Larrakia people at sovereignty. That is because I do not find that their current laws and customs are 'traditional' in the sense explained in *Yorta Yorta*.' [834] Justice Mansfield's decision was upheld by a full bench in April this year.

I want to turn briefly to the claim by a group of Yankunytjatjara and Pitjantjatjara people to the De Rose Hill Station in the far northwest of South Australia. It is significant because a Full Federal Court bench in overturning the original dismissal of the native title claim state several propositions of law in a way that seems to ameliorate some of the harsher effects of *Yorta Yorta*. And what is interesting about that is that the High Court refused the pastoralist respondent special leave to appeal from the full bench decision.

This is one of several cases where claimants seek to draw on the existence of a Western Desert cultural bloc, said to describe a population reaching far up central WA as well as the trilateral border area with South Australia and the NT.

One key factor in *De Rose* was that population shifts in the period since sovereignty had been dramatic. It had resulted in new groups moving in on territory post-1788, and a new society claiming rights today that had no biological connection to the one in occupation at sovereignty. In effect the Full Court found that the customary law for that country, including the law that determined who was Nguraritja or owner for particular areas, had remained constant. It was merely the people who had changed and there was nothing in section 223 to prevent the recognition of the latter group who had come to enjoy rights in this lawful fashion, despite the absence of a biological link. Population shifts had always happened under traditional law, given the incidence of drought and other extreme environmental conditions in the region. It is notable that, by contrast, population shifts at the western extremity of the Western Desert played a major role in the defeat of the *Wongatha* native title claim in the Goldfields earlier this year.

The Full Court in *De Rose* also endorsed the trial judge's finding that there had been a shift from a strict patrilineal model of people taking land through the father's line and that there were multiple paths to acquiring status as Nguraritja for land. And as an example of what he called 'evolutionary traditional law', that, the full bench, said was not inconsistent with the

requirement for continuity expressed in *Yorta Yorta*. It was within the tolerable limits of adaptation.

So the Full Federal Court found sufficient continuity to establish native title in *De Rose v South Australia*, despite 'population movements and probable changes in law and custom' and the arrival of the claimant group's ancestors in the area only in the 1920s.[3] The High Court's refusal of special leave to appeal is noticeable.

In a similar vein, Justice Wilcox found that whereas there was in 1829, it was agreed, 'a general rule of patrilineal descent, subject to exceptions', contemporary evidence showed that 'claims to matrilineal descent are now commonly recognised'.[4] Wilcox J said that widening the exception was a realistic response to the widespread fathering of Aboriginal children by non-Aboriginal men, necessary to sustain the general operation of land rules across Noongar society.[5] Similarly, other impacts like dispossession and child removal had made it 'obviously necessary' to allow a degree of choice of country greater than 'what would have been necessary in more ordered, pre-settlement times'.[6]

[3] *De Rose v South Australia* (2003) 133 FCR 325, 343.
[4] [2006] FCA 1243 [773].
[5] Ibid [774].
[6] Ibid [775].

Wilcox J's essential argument was that changes to descent rules – to more commonly accommodate matrilineal claims and to incorporate a greater element of individual choice in determining succession to land entitlement – were inevitable and essential to the continued survival and vitality of the normative system that had its origins in pre-sovereignty Noongar society.[7]

Justice Weinberg in the *Griffiths* decision from 2006 on land at Timber Creek, between Katherine and Kununurra, also confronted a gradual shift from a patrilineal to a wider cognatic system that took account of both mother's and father's sides. He said the crucial point was that rights to country 'are and always have been based upon principles of descent. The shift to cognation is one of emphasis and degree. It is not a revolutionary change, giving rise to a new normative system'.

In some cases, particular judges seem skeptical about claims of multiple pathways to acquisition of rights in land, rather than strict patrilineal descent. *Jango* was a compensation claim over the township of Yulara near Uluru, built after the Racial Discrimination Act came into effect and therefore potentially in the limited category of compensable past acts under the Native Title Act. Justice Sackville, however, found that the named compensation group were not the native title holders for the

[7] Ibid [777].

area. That is, the compensation issues were never reached, although the judge did not rule out that a smaller patrilineal descent group within the claimants might succeed in a future native title claim.

Jango was another Western Desert Bloc case, this time in its eastern extremity. But while the judge was prepared to find a Western Desert society that had continued to exist a degree of customary law observance was taking place, he said the group defined in the claim could not demonstrate observance of the laws about land contained in the pleadings. And he thought the repudiation by the applicants of patrilineal descent as the key element in acquiring rights was not supported by the evidence. This departure from what he said were pre-sovereignty norms was not shown to be adaptation within tolerable limits.

Justice Lindgren in the mind-numbingly long *Wongatha* decision – yet another Western Desert bloc case – was also uneasy with the presentation of multiple pathways to landedness by the applicants, doubting that something he saw as so idiosyncratic and unstable could be seen as normative.

Connection

I turn now to connection and here I will be much briefer. By the way, this is not really an elaboration from what was said in Yorta Yorta as the issue was not at the forefront of that case. Instead the issue I want to highlight is one the High Court deliberately refrained from answering in the *Ward* decision, the other native title test case earlier in 2002. Does a native title group have to demonstrate physical connection to land or waters, or the actual exercise or enjoyment of rights, in order to succeed under the Native Title Act. Or can a spiritual connection – such as the continued acknowledgment from afar of traditional law and custom for particular country - satisfy the requirements of paragraph (b) in section 223(1)? In a nation where so many Aboriginal people have been forcibly dispossessed or locked out of their traditional country, it is a highly pertinent question.

Pre-*Yorta Yorta*, the Full Federal Court found in *Ward* in 2000 that connection had been substantially maintained even though 'the ways in which the indigenous people were able to possess, occupy, use and enjoy their rights and interests in the land underwent major change' following European settlement.[8] 'In some areas of concentrated settler activity the reasonable inference is that Aboriginal presence became impracticable,

[8] *Western Australia v Ward* (2000) 99 FCR 316, 381-382.

save as people employed in the pastoral enterprises that had moved on to their lands.'[9]

The High Court did not express its own view on appeal in the *Ward* matter, as to the nature of connection required, but it did say 'the fact that there has been no recent exercise of the right does not necessarily deny the possibility that native title can be established'.[10] The *Bennell* decision in Perth involves extrapolation from a wider expanse of traditional country to a smaller area.

I think since then what we see in something such as the Full Court's obiter in *Alyawarr* is the momentum building behind the idea that physical absence from the land, the inability to show recent active exercise or enjoyment of particular rights, does not necessarily mean the disappearance of connection.

In this respect the law seems to be doing something a little unusual to date in Australian native title law and that is integrating an Indigenous perspective and one that also accommodates some of the realities of Australian history. By that I mean the idea that responsibility for particular country demonstrates connection to that country. Thus Peter De Rose was found in *De Rose* by the Full Court to have maintained

[9] Ibid 382.
[10] *Western Australia v Ward* (2002) 213 CLR 1, 207.

connection to the claim area despite an absence from it and what the judge said was a failure to discharge his responsibilities for it as Nguraritja. Under the traditional law he observed, he remained Nguraritja for that land.

In *Alywarr* the Full Court said that not enough emphasis had been placed on the idea of 'continuity of observance as a manifestation of connection'. The continuing assertion by the group of its traditional relationship to country defined by its laws and customs is what (b) focuses on. And the Full Court said this relationship may be shown by physical presence 'but also in other ways involving the maintenance of the stories and allocation of responsibilities and rights in relation to it'. None of these comments diminish, however, the size of the task facing claimants in establishing not just connection but all three elements of the definition in section 223. As the recent Full Court appeal decision in *Risk* said, dispossession or loss of physical connection and non-exercise of rights will make it difficult to demonstrate the requisite continuity. Similar comments about lapse of time are found in *De Rose No 2*.

Society

The final issue I want to talk about is the character of the group pursuing a native title claim and the society said by the High

Court to be necessarily co-terminous with the normative system of traditional law and custom.

The first observation is that since *Mabo*, Australian judges have generally been comfortable with the variable basis upon which people might organise themselves in pursuit of native title recognition. This is also reflected to some extent in the opening words of section 223 where native title rights encompass communal, group and individual rights.

As Justice Weinberg said in *Griffiths* last year,

> There have been cases where separate groups have asserted traditional rights in respect of discrete areas of land and sea, though perceiving themselves to be part of a broader community. Sometimes, as in *The Lardil Peoples v Queensland* [2004] FCA 298, native title has been found to exist severally, in each of the groups identified in respect of discrete defined areas of land. On other occasions there have been native title determinations in favour of a composite community of estate holding, or language groups with appropriate territorial, economic and social links; see for example *Ward v Western Australia* (1998) 159 ALR 483 ("*Ward* first instance"), *Daniel v State of Western Australia (No 2)* [2003] FCA 1425, *Neowarra,* and *Alyawarr* itself.

In some recent decisions you can see the view emerging that the concept of a 'society', which has attained such prominence because of what the High Court said in *Yorta Yorta*, should not be permitted to get out of hand. Justice French in *Sampi* and the

full court in *Alyawarr* both pointed out that this word does not appear in the Act, it shouldn't be treated as a term with particular technical content and it should not become a trojan horse, as French said, 'for the introduction of elements or criteria foreign to the requirements of the Act and the common law for the recognition of native title'. Certainly we see government parties challenging the entity which is said to be co-terminous with a normative system of laws and customs. For example, the existence of a Noongar society was challenged by the respondents on two bases:

- a failure to show the requisite amount of *unity* within that aggregation of people
- a failure to show the requisite amount of *distinctiveness* for that aggregation of people, as against neighbouring people.

Wilcox said a society is no more than what the Yorta Yorta decision said, a group united by the observance of common law and custom. There is no additional requirement for self-conscious political unity and organisation.

In *Sampi* French accepted that there was not a single Bardi-Jawi society but two separate societies and separate systems of law. He made a positive finding on the basis that Jawi people had merged into Bardi society in a way that was lawful in a

customary sense, but this was at the expense of recognising rights in some territory that at sovereignty had been Jawi land and water.

One significant development since 2002 was not really anticipated in *Yorta Yorta*. In that case, as in the Noongar claim to Perth, the Larrakia claim in Darwin and many others, the native title claimant group and the society whose laws they are said to observe are essentially the same thing. There is a mirror image between the claimant group and the society now required by Yorta Yorta. But some cases have raised a different question and in doing so, prompted exploration of the reference to 'group' rights in section 223. I am thinking in particular of the three Western Desert Bloc cases of *De Rose*, *Jango* the compensation claim at Yulara and *Wongatha* the recently decided case in the Goldfields.

In each case, the group or individuals seeking recognition did not claim to be a society in their own right. Rather they said their entitlements flowed from the observance of a normative system that belonged to a much larger society, named as the Western Desert cultural bloc, covering a vast part of central-western Australia. For the Full Court in *De Rose* this was no impediment to a finding of native title consistent with Yorta Yorta. A communal claim can be made on behalf of a society as

a whole. On the other hand, ‘group and individual native title rights and interests derive from a body of traditional laws and customs observed by a community, but are not necessarily claimed on behalf of the whole community. Indeed, they may not be claimed on behalf of any recognisable community at all, but on behalf of individuals who themselves have never constituted a cohesive, functioning community’.

Justice Sackville was part of the *De Rose* full court bench. Therefore in *Jango*, not surprisingly, he accepted that the Western Desert Bloc was a society whose members observe a body of law and custom, despite population shifts that may have taken place. However he criticised what he saw as deficiencies and internal inconsistencies in the presentation of the case. He said the evidence supported the possibility that a smaller group of people taking rights over country around Yulara on the basis of patrilineal descent may have succeeded, but the broader native title claimant group had not made out their case.

The recent Goldfields decision of *Wongatha*, however, the judge came down very hard in the end on the discrepancy between the way the claimant group was organised and the way traditional law said people acquired interests in land. The claimants organised themselves to pursue the claim as ‘associations of people who recognise each other’s claims to a portion of

country’. In terms of landholding itself, rights were conferred by the system on individuals or small groups. Justice Lindgren said it was not permissible to bring group claims that aggregated individual landholdings in this way, because the group and group interests asserted are not rooted in pre-sovereignty law and custom. I think, like *Jango*, Justice Lindgren said this caused a discrepancy in the way the claim was pleaded that was too significant to ignore and he could not proceed to identify native title holders within the claimant group without reference to the way the claim was pleaded.

I don’t seek to assess the relative responsibility between parties and judges for the shape of those two outcomes. But it does suggest a system that is sometimes working very badly. At the end of arduous and horrendously expensive claims, groups are being told that within your ranks there may well be native title holders. But because of the discrepancy between the form of organisation chosen today for the pursuit of native title claims and the form of pre-sovereignty landholding asserted by the claimants or insisted upon by the judge (*Jango*), your claim fails.

I make one other point. The statute requires judges to vest the native title one way or another in a prescribed body corporate (PBC), a land-holding and management vehicle. Most of the

existing PBCs are struggling for viability, resources and critical mass – with consequences for the credibility and ultimate worth of this whole elaborate and expensive system. The knowledge that a PBC must be created and the desirability that it be a viable one seems to me another reason why preserving a generally flexible doctrine and judicial approach in this area is appropriate.

Conclusion

We will learn more about these issues from the Full Federal Court as 2007 and 2008 unfolds, and possibly from the High Court as well, if special leave to appeal is granted in any of these cases.

We already have some indication, however, of where the Commonwealth would like to see the law head. And in part it seems reliant on a strategy of getting into the High Court and persuading it to overrule some of the reasoning I have discussed above that has tended to work to the benefit of some claimant groups.

In the recent *Risk* decision the Full Court referred to what it seemed to regard as a rather unhelpful intervention in that particular case. The Commonwealth's submission gives us a strong hint of what the Commonwealth would like to see the

Full Court and ultimately the High Court saying. As described by the Full Court:

> The purpose of the Attorney's intervention was to submit that the course set in Full Court native title appeals determined since *Yorta Yorta* – namely *De Rose v South Australia* (2003) 133 FCR 325, *De Rose v South Australia (No 2)* (2005) 145 FCR 290 and *Northern Territory v Alyawarr* (2005) 145 FCR 442 – had departed from what had been laid down in *Yorta Yorta*. It was said that there had been a similar departure in first instance decisions: *Sampi v Western Australia* [2005] FCA 777, *Rubibi Community (No 5) v Western Australia* [2005] FCA 1025 and *Bennell v Western Australia* [2006] FCA 1243.

Included in the submission was the sound of a large wooden horse being wheeled in, I thought: an argument that the concept of society must focus on the internal view of the claimants, 'not on an objective or academic analysis of cultural homogeneity or similarity, or intercourse between groups. Another proposition was that the concept of communal title has no independent role in native title. It is clear that native title groups will continue to face tooth and nail battles in the court over the flexibility and range of outcomes possible under Australian native title law, as far as defining the relevant group goes.

The question whether a 'purely spiritual connection' is sufficient remains to be definitively answered by the High Court.

On the continuity issue, we can assume that trial judges will continue to exercise the most significant power on this issue. The possibility remains, however, that ultimately the High Court may intervene on this controversy between what might be called literal versus substantive continuity. Or perhaps they may simply leave the ambiguity created in *Yorta Yorta* undisturbed.