THE MOTE IN THE COMMON LAW'S EYE:
DISLODGING EUROPOCENTRIC
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NATIVE TITLE IN THE WAKE OF YORTA
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THE MOTE IN THE COMMON LAW’S EYE: DISLODGING EUROPENCENTRIC BARRIERS TO JUST RECOGNITION OF NATIVE TITLE IN THE WAKE OF YORTA YORTA

Howard L. Highland*

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This paper is dedicated to the memory of Geneva and Hugh Marvin Highland, whose tradition of historiography continues herein.
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I. Introduction

A. Historical Background and Setting: unto 2002

After the British Empire established sovereignty over Australia in the nineteenth century, the Crown distributed land to settlers and private interests without any consideration of the rights and interests in the land belonging to the indigenous inhabitants. Thus the doctrine of *terra nullius* ("no one's land") became the legal grounds by which British authorities settled Australia. Indigenous inhabitants whose lands were encroached upon were afforded neither compensation nor recognition. That the Crown did not recognize the rights and interests of indigenous inhabitants and failed to declare any such interests extinguished upon conquest, however, would become an avenue to justice under the Australian common law in the late twentieth century.

Two hundred and four years after Captain Cook arrived in Botany Bay, the High Court of Australia recognized the continuing existence of
indigenous rights and interests in land where British or Australian sovereignty did not manifest a clear and plain intent to extinguish such rights and interests. On June 3, 1992, the High Court of Australia announced a stunning decision in *Mabo v Queensland II,* recognizing that indigenous Australians, to the extent that the ancient rights of their pre-colonial ancestors in land had been preserved and not extinguished, had retained "native title" in relation to that land. Wherever the Crown had not yet alienated land, thereby making the Australian sovereign the sole holder of legal rights through its radical title, the descendants of the indigenous inhabitants of that land would have a claim to coexisting rights and interests. Native title, as Brennan J's majority opinion articulated, thus exists as a "burden" upon the Crown's radical title. Furthermore, any indigenous community claiming native title to unalienated Crown land must have "substantially maintained . . . a traditional connexion" to their ancestral lands.

With rapid legislative response, Parliament gave its approval to the common law's recognition of "native title" by enacting the Native Title Act of 1993 (NTA). In line with modern perspectives on human rights and international justice, the NTA proclaims that the foremost aim of the Commonwealth of Australia is "to provide for the recognition and protection of native title." Basing its language on Brennan J's majority decision in *Mabo,* Parliament entrenched the definition of native title in § 223(1) of the NTA:

(1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

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1. See generally *Mabo v. Queensland II* (1992) 175 C.L.R. 1, 57–65 (requiring a clear and plain intent to extinguish a property right under the common law through legislative or executive act by the sovereign).
2. *Id.* *Mabo* involved the land ownership of the Murray Islands, as alleged by the Meriam Peoples. *Id.* at 4–5. The majority held that "the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands." *Id.* at 15. The Court granted native title to the Meriam Peoples. *Id.*
3. *Id.*
4. *Id.* at 57.
5. *Id.* at 58.
6. *Id.* at 59–60.
8. *Id.* at § 3(a).
(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; \(^9\) and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; \(^10\) and

(c) the rights and interests are recognised by the common law of Australia.

Though the NTA reflects an attempt to organize comprehensively the procedures and consequences of native title law, the Parliament that enacted the NTA could not have foreseen the excruciating complexity of defining native title through the judicial system. \(^11\) Several High Court decisions have elucidated further attributes of native title that were not yet recognized in 1993. \(^12\) In truth, native title today still remains an infant within the common law of property, \(^13\) and the common law of Australia continues to extend its recognition of native title's nature and characteristics only as the case law might demand. \(^14\)

Though an era of optimism followed the High Court decisions in *Mabo* and *Wik*, the honeymoon ended abruptly in 2002, when the High Court decided three native title cases that impose onerous obstacles on indigenous peoples' native title claims over land. \(^15\) This Note examines the consequences of the High Court of Australia's final of those three decisions, *Members of the Yorta Yorta Aboriginal Community v Victoria*. \(^16\)

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\(^9\) Cf. *Mabo v. Queensland II* (1992) 175 C.L.R. 1, 57 (“The term 'native title' conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants.”).

\(^10\) Cf. *id.* at 70 (“Native title to particular land... its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land.”).

\(^11\) NTA § 223(1).

\(^12\) See, e.g., *Wik Peoples v. Queensland* (1996) 187 C.L.R. 1 (holding that native title could also exist partially, in concurrence with certain leaseholds that failed to amount to alienated Crown land). The holding in *Wik* significantly influenced Parliament’s act to amend the NTA, the Native Title Amendment Act of 1998.

\(^13\) The rights and interests that constitute native title, however, are far more ancient in practice. See NTA § 223(1)(c) (deferring to the common law in the recognition of what constitutes native title).


\(^15\) *Yorta Yorta*, 214 C.L.R. at 422. In 1994, the Yorta Yorta indigenous community filed for native title to public land and water in Northern Victoria and Southern New South Wales. *Id.* at 423. Title was denied at the lower court, and appeals were subsequently dismissed. *Id.*
In *Yorta Yorta*, the High Court's Joint Judgment majority elaborated further upon Brennan J's requirement in *Mabo* and its own interpretation of NTA § 223(1), that native title claimants prove a "traditional connection" to land. The trial judge\(^{17}\) who presided over *Yorta Yorta* had relied almost exclusively upon *Mabo*’s common law test to decide whether the indigenous claimants had "substantially maintained" their traditional connection or whether their traditions had been "washed away by the tide of history."\(^{18}\) Indicating that the trial judge "may [have given] undue emphasis ... to what was said in *Mabo [No 2]*"\(^{19}\) when interpreting NTA § 223(1), the High Court clarified that the present definition of native title originates, not from *Mabo* or any other common law decision, but principally from NTA § 223(1).\(^{20}\)

According to the majority, the requirement that native title claimants demonstrate a "traditional connection" should not be analyzed solely through Brennan’s guidelines in *Mabo*, but rather it is the language of NTA § 223(1)(b) that should define the initial search for "a connection by [traditional] laws and customs." The statutory definition of "native title rights and interests"\(^{21}\) itself requires that the contemporary laws and customs of the applicant indigenous people must be the same as the "traditional laws and customs" that existed before the arrival of British or Australian sovereignty.\(^{22}\) No interruption to the practice of traditional law and customs may have occurred,\(^{23}\) and the traditional legal system of the indigenous people, though the High Court insisted that it could "adapt" traditional laws and customs in response to the British Colonization, may not have ever

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\(^{17}\) Typically termed the "primary judge" in the jargon of Federal Court of Australia, use of the term "trial judge" is intended to avoid confusing an American audience. "His Honour," however, is still His Honour.


\(^{19}\) *Yorta Yorta*, 214 C.L.R. at 451, ¶ 70.

\(^{20}\) *Id.* at 453, ¶ 75 (Gleeson, C.J., Gummow & Hayne, JJ.).

\(^{21}\) NTA § 223(1).

\(^{22}\) *Yorta Yorta*, 214 C.L.R. at 455, ¶ 83. *But cf. Mabo*, 175 C.L.R. at 60 ("A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition. Australian law can protect the interests of members of an indigenous clan or group, whether communally or individually, only in conformity with the traditional laws and customs of the people to whom the clan or group belongs and only where members of the clan or group acknowledge those laws and observe those customs (so far as it is practicable to do so).”).

\(^{23}\) *Yorta Yorta*, 214 C.L.R. at 455–56, ¶¶ 84–87.
engaged in "parallel law-making" after the British declared sovereignty over the indigenous people's land.\textsuperscript{24}

Even though, as the dissent pointed out, NTA § 223(1) may be interpreted just as plausibly without requiring any such demonstration of historical continuity,\textsuperscript{25} we are bound today to accept the controlling weight of the majority's holding in \textit{Yorta Yorta}. Within the scope of the majority's holding, however, this Note endeavors to "redefine the boundaries of the exclusive zone"\textsuperscript{26} within which oral indigenous and anthropological evidence of a traditional and customary connection to land ought to be weighed. Part I of this Note examines how the new common law test from \textit{Yorta Yorta} suffers from a dearth of instruction in weighing evidence of modification of or adaptation to traditional laws and customs. Broadly, the Court instructs that the fundamental inquiry must answer: "[h]ow . . . does the definition of native title take account of whether there has been some modification of or adaptation to traditional law and custom, or some interruption in the exercise of native title rights and interests?"\textsuperscript{27} Because the petition before the High Court in \textit{Yorta Yorta} only challenged the lower courts' finding and affirmation that the traditional laws and customs of the Yorta Yorta Aboriginal Community had been interrupted, the majority was in fact obligated to implement only half of its theoretical analysis. Since \textit{Yorta Yorta}'s fact pattern did not permit the High Court to fully explore its theoretical postulates about the common law consequences of change to uninterrupted traditional laws and customs, the High Court failed to provide sufficient guidelines for analysis of the qualitative identity between the pre-colonial "traditional laws and customs" and the contemporary realization of traditional laws and customs. Part I of this Note demonstrates that the analytical test created in \textit{Mabo} must necessarily be combined with the \textit{Yorta Yorta} test if native title claims are to "contain rules of evidence that contain rational procedures of inquiry."\textsuperscript{28} The defects of the latter need to be cured if native title is to be restored a reputation as "a process reasonably designed to ascertain the truth."\textsuperscript{29}

Part II shows the foremost defect of this "traditional connection" test in \textit{Yorta Yorta} through two lower court decisions from 2006, \textit{Jango v

\textsuperscript{24}Id. at 443-44, ¶¶ 43-44.
\textsuperscript{25}Id. at 463, ¶ 111, and at 446, ¶ 123 (Gaudron & Kirby, JJ., dissenting).
\textsuperscript{27}Yorta Yorta, 214 C.L.R. at 454, ¶ 78.
\textsuperscript{29}Id. at 897 (citing JOHN RAWLS, \textit{THEORY OF JUSTICE} 238 (1971)).
In the Wake of Yorta Yorta

Northern Territory of Australia and Griffiths v Northern Territory of Australia. Because the High Court’s majority in Yorta Yorta purposely avoided meaningful discussion of how courts should weigh evidence of modification of or adaptation to traditional laws and customs, there has been a severe divergence between Federal judges’ interpretations of how change to traditional laws and customs has impacted the traditional connection required of an indigenous people to the claimed land. Even though the NTA provides significant discretion to the Federal Courts in their adherence to the rules of evidence, the disparate forms of evidence used in native title claims, i.e., expert testimony, ethnographic history, and indigenous oral evidence, are not yet well conceived in relation to one another under the common law. Part II seeks to clarify the manner in which these forms of evidence should be presented and perceived as a whole.

In both Jango and Griffiths, each judge found as a matter of fact that a similar change to the traditional system of descent had occurred, from a narrow system of patrilineal descent into a broader cognatic one. Regarding the legal implications of such change, however, these two Federal judges came to diametrically opposed conclusions. The trial judge in Jango, on the one hand, implemented Yorta Yorta’s guidelines for analyzing the "traditional connection," whereas the trial judge in Griffiths made use of the guidelines from both Mabo and Yorta Yorta; these differences indicate just how much the legal interpretation of what constitutes a "traditional connection" may gravely affect the weighing of evidence. By critically reviewing the manner in which the primary judges in Jango and Griffiths weighed indigenous oral evidence and anthropological expert evidence of an alleged change to the system of kinship and descent in accordance with their divergent legal interpretations, our analysis seeks both to improve the

30 Jango v. N. Territory Of Austl. (2006) 152 F.C.R. 150. In Jango, the applicants were of the Yankunytjatjara and Pitjantjatjara peoples, who were seeking compensation from the Northern Territory Government for native title rights. Id. at 151. Their interests had been extinguished by compensation acts enacted from 1979 to 1994. Id. The Court, finding that the applicants did not meet their burden, denied compensation. Id.

31 Griffiths v. N. Territory of Austl. (2006) F.C.A. 903. Griffiths involved the determination of native title of a town called Timber Creek. The court found the native peoples had non-exclusive native title rights to use and enjoy the land and waters of the claim area.

32 See Yorta Yorta, 214 C.L.R. at 455, ¶ 83 (stating that "[t]he relevant criterion to be applied in deciding the significance of change to, or adaptation of, traditional law or custom is readily stated (though its application to particular facts may well be difficult").

33 NTA § 82(1).


35 Id.

36 Id.
common law's comprehension of anthropological expertise and ethnographic history, and to illuminate how anthropological expertise and indigenous witness testimony should be weighed holistically with reference to the fullest available interpretation of the definition of native title.

Part III concludes this Note by addressing the ultimate conceptual deficiency in the guidelines posited in *Yorta Yorta*: when the High Court majority attempted to develop the term "normative system" as a universal descriptor of all societies with a cognizable system of laws, it failed to distinguish sufficiently between a Western "normative system" and an indigenous Australian one. Intended to assist lower courts in implementing the statutory definition of native title under NTA § 223(1), the "traditional connection" test inquires whether native title claimants adhere to a "normative system" of laws and customs which consists of the same traditional laws and customs as their ancestors' "system." The High Court's attempt to define a universal conception of all legal systems in *Yorta Yorta* is the ultimate source of undue prejudice in *Jango* against the native title claimants. Despite the High Court's admonition that a "normative system" need not "have all the characteristics of a developed European body of written laws," its parallel announcements, that "only those normative rules [of ancient origin] are 'traditional' laws and customs," and that "[after] the assertion of sovereignty by the British Crown . . . there could [] be no parallel law-making system," may easily mislead a trial judge in any native title claim to scrutinize traditional laws and customs mistakenly in light of general characteristics of European written laws. The "normative rules" of indigenous Australian peoples must be better conceptualized within the common law: no room can be left for the factfinder in native title claims to continue in their misrecognition of traditional laws and customs through inapt precepts of the Western legal tradition. Traditional laws and customs of indigenous Australians are not to be treated in a common law court like a codex of ancient practices. In order to avoid the confusion that "normative rules" can create in native title claims, Part III urges that a better understanding of indigenous Australian "normative systems" will seek to find the "normative principles" that have been preserved through tradition and permissible adaptation.

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38 *Id.* at 441–42, ¶ 39.
39 *Id.* at 444, ¶ 46.
40 *Id.* at 443–44, ¶ 44.
II. Part I: Answering the Unanswered Question of Yorta Yorta: What constitutes Modification to Traditional Laws and Customs Sufficient to Extinguish Native Title?

A. Towards a Definition of Native Title: The Meaning of Mabo and NTA § 223(1) after Yorta Yorta

On June 3, 1992, the High Court of Australia acknowledged in *Mabo v. Queensland* II that the ancient rights and interests in land and waters of indigenous Australians survived the arrival of British sovereignty, and that those ancient rights and interests have a continuing vitality in relation to the common law, wherever those rights and interests have not been extinguished. Brennan J, whose decision in *Mabo* would ultimately provide the foundation for the Native Title Act's definition of "native title," articulated that "native title" will have survived as much as 204 years of legal suppression wherever:

1) traditional laws and customs of an identifiable indigenous community had created rights and interests in land prior to the declaration of British sovereignty;

2) the executive or legislative actions of an Australian sovereign, in relation to Crown land "burdened" by native title rights or interests, were not inconsistent with the continuing existence of native title and therefore had not extinguished native title rights and interests;

3) those traditional laws and customs, originating from pre-colonial indigenous societies, and giving rise to native title rights and interests, have been "substantially maintained" in the intermediate period by the identifiable community descending from the original indigenous community between the declaration of sovereignty and the recognition by the common law of those rights.

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42 *Id.* at 15.
43 Native Title Act, 1993, TA § 223. *Cf. Mabo*, 175 C.L.R. at 57, ¶ 61 (defining native title as "the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants").
44 *Mabo*, 175 C.L.R. at 69 and 70, ¶ 83 (points 3 and 6).
45 *Id.* (points 1 and 4).
46 *Id.* (points 6 and 7).
4) the native title rights and interests deriving from traditional laws and customs must be recognizable under the common law before they may be legally recognized.\footnote{Id. at 57. See also Members of the Yorta Yorta Aboriginal Cmty. v. Victoria (2002) 214 C.L.R. 422, 454, ¶ 77 ("[N]ative title rights and interests which are the subject of the [NTA] are those which existed at sovereignty, survived that fundamental change in legal regime, and now, by resort to the processes of the new legal order, can be enforced and protected. It is those rights and interests which are "recognised" in the common law.").}

In response to \textit{Mabo}, the Australian Parliament acknowledged the importance of protecting native title by enacting the Native Title Act of 1993 (NTA).\footnote{See Native Title Act, 1993, § 3 (stating the foremost object of the Act: "to provide for the recognition and protection of native title.").} The NTA’s provisions have established the procedures for handling native title claims,\footnote{See, e.g., Native Title Act, 1993, § 44E (demarcating Federal Court jurisdiction).} as well as codifying the complex substantive rules that delineate under what circumstances just compensation shall be paid for extinguished native title.\footnote{Native Title Act, 1993, § 11.} Most important for our purposes, the NTA has also enshrined the principal elements of Brennan J’s definition of native title in § 223(1):

(1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognized by the common law of Australia.\footnote{The definition of native title under the NTA § 223 does differ in several instances from the phrasing of Brennan in \textit{Mabo}: e.g., rights and interests “in relation to land” has replaced “rights and interests in land.”}

Although the NTA articulated definitive procedures and guidelines for the sake of native title law, difficult questions of law have nevertheless found their way before the High Court. For example, questions have arisen about the possibility that native title is not completely extinguished whenever an act by a sovereign entity is only partially inconsistent with native title
right and interests,\(^5\) whether native title rights and interests are beyond the scope of what the common law can recognize,\(^5\) and if the ability of the sovereign to regulate activities observed under traditional laws and customs shall extinguish the recognizable native title rights and interests.\(^5\)

As the first decade of native title's recognition came to a close,\(^5\) the High Court in 2002 found it necessary to declare in *Yorta Yorta* that the definition of native title is to be found exclusively in statute.\(^5\) The announcement of this principle has been a serious source of controversy.\(^5\) Noel Pearson has commented that the NTA definition of native title was meant to be fluid, and that § 223(1)(c) was intended to enshrine native title as "a faithful reflection" of the continuously developing definition of common law jurisprudence.\(^5\) Indeed, the legislative history for both the NTA and the Native Title Amendment Act of 1998 indicate that the Parliament of Australia intended that "our [Act preserve] the fact of common law; who holds native title, what it consists of is entirely a matter for the courts of Australia. It is a common law right."\(^5\) Despite the reasonableness of Pearson's interpretation,\(^6\) modern native title practitioners must today accept the High Court's emphatic declaration that the meaning of native title has its foundation in NTA § 223(1), implementing common law native title.

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\(^5\) Since Mabo v. Queensland II (1992) 175 C.L.R. 1, native title applicants have witnessed a change in Parliamentary leadership, the Native Title Amendment Act of 1998, and several more High Court decisions tweaking our understanding of native title.

\(^5\) "To speak of the 'common law requirements' of native title is to invite fundamental error. Native title is not a creature of the common law, whether the Imperial common law as that existed at the time of sovereignty and first settlement, or the Australian common law as it exists today. Native title, for present purposes, is what is defined and described in § 223(1) of the Native Title Act. *Mabo* [No 2] decided that certain rights and interests relating to land, and rooted in traditional law and custom, survived the Crown's acquisition of sovereignty and radical title in Australia. It was this native title that was then 'recognised and protected' in accordance with the Native Title Act and which, thereafter, was not able to be extinguished contrary to that Act. *Members of the Yorta Yorta Aboriginal Cmty. v. Victoria* (2002) 214 C.L.R. 422, 453, ¶ 75.

\(^5\) See, e.g., Dr. Lisa Strelein, *From Mabo to Yorta Yorta: Native Title Law in Australia*, 19 WASH. U. J.L. & POL'Y 225, 255 (characterizing the majority's conclusions of law in *Yorta Yorta* as an "abdication of judicial responsibility").


\(^5\) Id. (emphasis added) (quoting Senator Minchin, Commonwealth, *Parliamentary Debates*, Senate, 2 December 1997, 10171).

\(^6\) See Native Title Act, 1993, § 223(1)(c) (native title "rights and interests [exist only where] recognised by the common law of Australia").
jurisprudence rather as guideposts in trying to refine what § 223(1) means by "native title."\(^{61}\)

Though it may be judicially expedient to utilize a simplified documented standard in cases of ancient rights surviving the arrival of the common law,\(^{62}\) in doing so, the fairness of such a solution depends upon interpretation of the NTA which is mindful of common law holdings, especially the seminal exposition of Brennan in *Mabo* on the nature of native title rights and interests. *Mabo* must be integral to the interpretation of the NTA definition of native title whenever a debate over its meaning should arise.\(^{63}\) Just as much as legislative history is typically central to statutory interpretation, in the unique case of NTA, the direct derivation of § 223(1) from Brennan J’s very own words compels any judge who attempts to interpret the meaning of native title’s definition to contemplate Brennan J’s full thoughts on the nature and quality of native title.\(^{64}\)

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\(^{61}\) See Yorta Yorta, 214 C.L.R. at 451, ¶ 70 ("undue emphasis [should not be] given . . . to what was said in *Mabo* [No 2], at the expense of recognising the principal, indeed determinative, place that should be given to the Native Title Act."). Id. ¶ 76 ("the reference in par (c) of s 223(1) to the rights or interests being recognised by the common law of Australia cannot be understood as a form of drafting by incorporation, by which some pre-existing body of the common law of Australia defining the rights or interests known as native title is brought into the Act. To understand par (c) as a drafting device of that kind would be to treat native title as owing its origins to the common law when it does not. And to speak of there being common law elements for the establishment of native title is to commit the same error. It is, therefore, wrong to read par (c) of the definition of native title as requiring reference to any such body of common law, for there is none to which reference could be made.").


\(^{63}\) "No doubt account may be taken of what was decided and what was said in [*Mabo* [No 2]] when considering the meaning and effect of the NTA. This is especially so when it is recognised that pars (a) and (b) of s 223(1) plainly are based on what was said by Brennan in *Mabo* [No 2]." W. Austl. v. Ward (2002) 213 C.L.R. 1, ¶ 16. But cf. Members of the Yorta Yorta Aboriginal Cmty. v. Victoria, (2002) 214 C.L.R. 422, 460, ¶ 104 (Gaudron & Kirby, JJ.) (accepting statute but refusing to read "substantially maintained" into its requirements).

\(^{64}\) *Yorta Yorta*, 214 C.L.R. at 487, ¶ 172 (Callinan, J.). Even though Judge Olney was implicitly found to have erred in his statement that "223 [merely] provides a definition of native title for the purposes of the Native Title Act, "his failure to accord the statute its proper weight was not a prejudicial error of law, for he did correctly assess that "it is necessary to understand the context in which § 223(1) was developed and to do this it is of assistance to refer briefly to several passages from the judgments in *Mabo* No 2. *Members of the Yorta Yorta Aboriginal Community v. The State of Victoria & Ors* [1998] F.C.A. 1606, ¶ 3.
Admittedly, the High Court in *Yorta Yorta* found that the trial judge had emphasized *Mabo*’s "rules" too much over the elements of NTA § 223. The fact, however, that the High Court fashioned a new test for "traditional connection" analysis—a test which fabricated several common law tools to inquire into the existence of an eligible "normative system"—for the sake of guiding lower courts in interpreting NTA § 223, implies that the conceptual guidelines of *Mabo* can be implemented for judicial interpretation. The majority decision in *Ward* only a few months earlier clearly affirms use of *Mabo* for interpretation of § 223(1).66

The allowance of *Mabo* into native title proceedings today is absolutely essential, for there are deficiencies in the "traditional connection" test from *Yorta Yorta*. In Part II we will return to the practical shortcomings of applying *Yorta Yorta* alone to evidence relevant to proof of a traditional connection in relation to land, especially as the exclusive use of that test in *Jango* proves ultimately to be unsatisfactory. First, however, it is necessary to understand how the High Court of Australia constructed its "traditional connection" test in *Yorta Yorta*. The next section demonstrates why it is incumbent upon the Federal Courts to augment the lessons from *Yorta Yorta* with the guidance of Brennan in *Mabo* to understand whether a native title claim group has preserved its traditional laws and customs in relation to land successfully.

**B. The Limitations of Yorta Yorta: The New Test for a "Traditional Connection" and the Unknown Consequences of Change**

In its substantive elements, § 223(1)(b) requires that native title claimants demonstrate, "by [traditional] laws and customs . . . a connection with land or waters." Although the native title claimants in *Yorta Yorta* insisted that § 223(1)(b) meant "the rights and interests presently possessed presently acknowledged and customs presently observed, and to a present connection by those laws and customs," the High Court nevertheless ruled that:

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65 See *Yorta Yorta*, 214 C.L.R. at 451, ¶ 70 (noting it "may be that undue emphasis was given in the reasons to what was said in *Mabo* [No 2], at the expense of recognising the principal, indeed determinative, place that should be given to the *Native Title Act*.")

66 "No doubt account may be taken of what was decided and what was said in *Mabo* [No 2]) when considering the meaning and effect of the NTA. This is especially so when it is recognised that pars (a) and (b) of s 223(1) plainly are based on what was said by Brennan in *Mabo* [No 2]." *W. Austl. v. Ward* (2002) 213 C.L.R. 1, 65, ¶ 16.

[I]t would be wrong to confine the inquiry for connection between claimants and the land or waters concerned to an inquiry about the connection said to be demonstrated by the laws and customs which are shown now to be acknowledged and observed by the peoples concerned. Rather, it will be necessary to inquire about the relationship between the laws and customs now acknowledged and observed, and those that were acknowledged and observed before sovereignty, and to do so by considering whether the laws and customs can be said to be the laws and customs of the society whose laws and customs are properly described as traditional laws and customs.68

As much as the High Court in Yorta Yorta might have been critical of the trial judge's reliance upon Mabo in defining native title, it too could not avoid fabricating a new common law test in Yorta Yorta to discern whether the necessary "traditional connection" existed.69 The High Court majority formulated that the "normative system"70 which constitutes traditional laws and customs could not have validly created new rights and interests in land after the assertion of British sovereignty.71 Were the indigenous normative system to engage in "parallel law-making" after the British Crown acquired sovereignty, the rights and interests in relation to land would lose their "traditional" aspect and cease to be recognizable under NTA § 223(1)(c).72 The court did recognize, however, that "significant adaptations" to traditional laws and customs could have occurred in accordance with NTA § 223(1)(b), insofar as such changes were "developments . . . of a kind contemplated by [ ] traditional law and custom."73 Furthermore, the High Court precluded recognition of any native title rights and interests where traditional laws and customs had been ceased and then reassumed: "acknowledgment and observance of [traditional] laws and customs must have continued substantially uninterrupted since sovereignty."74

Although Chief Justice Gleeson, Justice Gummow, and Justice Hayne muse how "the definition of native title take[s] account of whether there has been some modification of or adaptation to traditional law and

68 Id. at 447, ¶ 56.
69 Native Title Act, 1993, §223(1)(b).
70 See Yorta Yorta, 214 C.L.R. at 443, ¶ 42 (explaining that the system must have "normative rules," as opposed to "mere observable patterns of behaviour" to qualify as having "normative content").
71 Id. at 443, ¶ 43.
72 Id. at 443–44, ¶ 44.
73 Id. at 443, ¶ 44.
74 Id. at 456, ¶ 87.
custom, or some interruption in the exercise of native title rights and interests," in *Yorta Yorta* they only demonstrate how to answer the latter half of that inquiry, providing only piecemeal guidelines regarding the analysis of modification of tradition. Indeed, the High Court merely poses the issue without any further guidance: "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 . . . ?" The remainder of the majority decision is dedicated exclusively to the issue of an interruption to tradition.

The High Court majority did not resolve both the theoretical problems which it raised because the facts peculiar to the native title claim advanced in *Yorta Yorta* did not provide occasion to examine whether change to tradition had occurred. Only an apparent interruption to the traditional laws and customs of the indigenous claim group was at issue. The native title claim was denied by the trial judge due to his conclusion that:

> [I]n the context of a native title claim the absence of a continuous link back to the laws and customs of the original inhabitants deprives those activities of the character of traditional laws acknowledged and traditional customs observed in relation to land and waters which is a necessary element of both the statutory and the common law concept of native title rights and interests.

After the Full Court affirmed Olney J’s ruling, the High Court clarified that it was only reviewing:

> [F]indings about interruption in observance of traditional law and custom not about the content of or changes in that law or custom . . . . More fundamentally than that, they were findings that the society which had once observed traditional laws and customs had ceased to do

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75 *Id.* at 454, ¶ 78.
76 *Id.* at 455, ¶ 83.
78 *Id.* ¶ 95. "These findings were findings about interruption in observance of traditional law and custom not about the content of or changes in that law or custom." *Id.*
80 Members of the Yorta Yorta Aboriginal Cmty. v. The State of Victoria & Ors (2001) 110 F.C.R. 244.
so and, by ceasing to do so, no longer constituted the society out of which the traditional laws and customs sprang.\textsuperscript{81}

Thus, no comprehensive test exists by which lower courts may decide, in evaluating a modification of or adaptation to traditional laws and customs, whether "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 societies that existed before the assertion of sovereignty by the British Crown."\textsuperscript{82}

\textbf{C. Extending the doctrine of Yorta Yorta: permissible adaptations and self-extinguishing "parallel law-making"}

The majority in \textit{Yorta Yorta} articulated so generalized a standard for analyzing change to tradition that its "traditional connection" test fails to provide lower courts with the guidance necessary to analyze whether the evidence reflects a permissible adaptation or an impermissible "parallel law-making."\textsuperscript{83} Although the court noted that "[a]ccount may have to be taken of developments at least of a kind contemplated by that traditional law and custom,"\textsuperscript{84} it failed to distinguish in any way what constitutes "parallel law-making" and what qualifies as "significant adaptations."\textsuperscript{85}

Notably absent from the majority’s expressed test of whether traditional laws and customs have been preserved is Justice Brennan’s seminal explication in \textit{Mabo}, that:

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 \textit{substantially maintained}, the traditional community title of that clan or group can be said to remain in existence.\textsuperscript{86}

\textsuperscript{81} Yorta Yorta, 214 CLR at 458, ¶ 95
\textsuperscript{82} \textit{Id.} at 444, ¶ 46.
\textsuperscript{83} \textit{Id.} at 443–44, ¶¶ 43–44.
\textsuperscript{84} \textit{Id.} ¶ 43–44.
\textsuperscript{85} See \textit{id.} (articulating that "significant adaptations" to traditional law and custom may be recognized, but emphasizing in the next sentence that "sovereignty by the British Crown necessarily entailed . . . that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty.").
\textsuperscript{86} \textit{Mabo v. Queensland II} (1992) 175 C.L.R. 1, 59–60.
Even though the majority decision in *Ward* clearly affirms use of *Mabo* for interpretation of § 223(1)(b), and the majority in *Yorta Yorta* expressly derives from *Mabo* its concept of "normative" rules, which it introduced for the sake of interpreting NTA § 223(1)(b), it failed to relate its own analytical test, introducing concepts such as "normative system," "parallel law-making," and "significant adaptation," to *Mabo*’s "substantially maintained" test.

Much of the reason for omission of the "substantially maintained" standard by the High Court majority in *Yorta Yorta* would appear to be the dissent of Judges Kirby and Gaudron, who were confounded at the use of such a phrase by the trial judge when it does not appear in the actual text of § 223. Perhaps the dissent might have found acquiescence in the majority’s statement that "undue emphasis was given [by the primary judge] to what was said in *Mabo [No 2]*, at the expense of recognising the principal, indeed determinative, place that should be given to the *Native Title Act.* In addressing whether an interruption to the exercise of native title rights and interests had occurred, however, the majority in fact articulated an extremely specific application of the *Mabo standard* by adopting "the proposition that acknowledgment [of traditional laws] and observance [of traditional customs] must have continued substantially uninterrupted . . . ."

Despite this clear application of precedent, failure to reaffirm the *Mabo* test explicitly in *Yorta Yorta* has led to variegated application of common law precedents in several recent Federal Court decisions related to issues of modification of or adaptation to traditional laws and customs. The High Court’s failure to affirm to the broader test of *Mabo* for a "traditional connexion . . . substantially maintained" has misled some judges, perhaps out of fear of being overturned, to avoid use of the "substantially maintained" test altogether. Failure to implement Brennan J’s original "substantially maintained" test alongside the new terms of art

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87 "No doubt account may be taken of what was decided and what was said in [Mabo [No 2]] when considering the meaning and effect of the NTA. This is especially so when it is recognised that pars (a) and (b) of s 223(1) plainly are based on what was said by Brennan in Mabo [No 2 Mabo [No 2]]." W. Austl. v. Ward (2002) 213 C.L.R. 1, 65, ¶ 16.
89 *Yorta Yorta*, 214 C.L.R. 422, 460, ¶ 104.
90 *Id.* at 451, ¶ 70.
91 *Id.* at 456, ¶ 89 (emphasis added).
established by the majority in *Yorta Yorta* could mislead trial judges even further by focusing their analysis upon the extent to which change to tradition has occurred, rather than upon the extent to which traditional laws and customs have been preserved. In Part II, the difficult task of weighing together the disparate forms of evidence typical to native title claims is reviewed through the specific application, on the one hand, of the "traditional connection" test from *Yorta Yorta* by Judge Sackville in *Jango*, and, on the other hand, of the combined guidance from the High Court decisions in both *Mabo* and *Yorta Yorta* by Judge Weinberg in *Griffiths*. This comparison demonstrates that the significant amount of variance that can result between these divergent approaches can prejudice a native title claim if the factfinder seeks merely to find excessive and disqualifying change to tradition, rather than to identify how the native title claimants have preserved their traditional normative system. Frankly, as Part III will show later, the former method endows the trial judge with such arbitrary discretion to evaluate the disparate forms of evidence relevant to the "traditional connection" to land that an individual judge could arguably infer excessive transformation in every case, threatening to allow willing trial judges to interpret *Yorta Yorta* in such a way that "no native title claim could ever succeed ...".

III. Part II: The Weighing of Evidence Pertaining to Traditional Laws and Customs: Judicial Practices Observed, and Reforms Recommended

A. *Yorta Yorta* as Precedent: Into *Jango* and *Griffiths*

The failure in *Yorta Yorta* to incorporate explicitly the "substantially maintained" standard of *Mabo* has caused several courts to analyze questions of modification of or adaptation to traditional laws and customs through differing interpretations of the "traditional connection" requirement of NTA § 223(1)(b). Although *Yorta Yorta* has provided several pointed guidelines (of varying precision) from which Federal judges might begin evaluating modification of or adaptation to traditional laws and customs, ultimately these instructions are so generalized that a troubling inexactness is evident in comparing their respective application in *Jango* and *Griffiths*. How could their respective Federal judges reached completely divergent interpretations of nearly identical facts?

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97 Id. ¶ 432.
1. Similar issues, divergent analyses

At the root of the continuity question in Jango and Griffiths, there is a remarkable similarity in controversy. In essence, in both cases:

The issue that divides the parties is simply whether there has been a fundamental change in the normative system that underlies the acquisition of native title, from a patrilineal descent system to a cognatic descent system, and if so, whether that prevents the present claimants from maintaining a traditional connection with the land, in accordance with traditional laws and customs.\(^8\)

The conclusions of fact reached by the respective justices were identical: a patrilineal system was found to have become much broader in its allowance of who might acquire rights through descent and birth.\(^9\) Their respective conclusions of law, however, in light of Yorta Yorta's broadly articulated standards for modification of or adaptation to tradition, were completely divergent.\(^10\)

In Jango, Judge Sackville, implementing the "significant adaptation" test of Yorta Yorta in the absence of Mabo's "substantially maintained" test, found that a change from a patrilineal system of descent governing the transmission of native title rights to a broader "cognatic" practice today is too great to be considered continuous from pre-colonial rights and interests.\(^101\) His Honour presumed that such a transition must constitute the "parallel law-making"\(^102\) that shall have negatived their claims.\(^103\) Judge Weinberg, on the

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\(^9\) Griffiths, F.C.A. 903 ¶ 560 (explaining that "biological descent need not be patrilineal"); cf. Jango, 152 F.C.R. at 198, ¶ 193 (recognizing that "the High Court in Yorta Yorta [established] that interruption to the use and enjoyment of native title rights and interests is not necessarily fatal to establishing present (or in this case recent) possession of such rights and interests . . . .").

\(^10\) Griffiths, F.C.A. 903 ¶ 560 (concluding, "there is no real dispute in this case as to the ancestral connection between what might be termed 'the original native title holders,' and the present claimants"). Cf. Jango v. N. Territory of Austl. [2006] 152 F.C.R. at 205, ¶ 150 (resolving that "if the evidence supports the proposition that the traditional laws and customs of the eastern Western Desert adopt a patrilineal model of land tenure, their claims cannot succeed.").


\(^102\) Members of the Yorta Yorta Aboriginal Cmty. v. Victoria (2002) 214 C.L.R. 422, 443–44, ¶¶ 43–44 (referencing the joint opinion of Gleeson CJ, Gummow and Hayne JJ which concluded that once sovereignty was asserted, there could be no parallel law-making system; as a result, the only rights or interests that would be recognized as native title rights after the date of the assertion of sovereignty are those that find their origin in pre-sovereignty law and custom).
other hand, makes full use in Griffiths of Mabo's "substantially maintained" standard and considers the incipient principles of Yorta Yorta in order to find that the perceived change from a patrilineal system of descent to a bilateral/cognatic system was an adaptation of a kind contemplated under traditional laws and customs. The major difference in identifying the issues at stake in Griffiths and Jango lies in these distinct analytical reference points. For Judge Sackville, the mere existence of a significant change in traditional laws and customs could be seized for the sake of denying native title claims. Where Judge Sackville's analysis stopped, Judge Weinberg asked the further question—whether the identified change to traditional laws and customs has fundamentally transformed the pre-colonial normative system beyond the contemplation of traditional laws and customs. The need to resolve this analytical discrepancy is pressing.

2. Elucidating Reform: calibrating the weight of evidence in native title claims

The fundamental lacuna in Yorta Yorta's guidelines for analyzing the impact of changes in tradition upon a native title claim is the failure to advise the lower courts of recommendations in the weighing of evidence. Although, clearly, we do not contest that "[i]t is not possible to offer any single bright line test for deciding what inferences may be drawn or when they may be drawn, any more than it is possible to offer such a test for deciding what changes or adaptations are significant," the discretion of Federal judges who weigh evidence must be better informed by the High Court regarding the nature of the evidence which they are to weigh.

The disparate manners in which evidence was weighed in Jango and Griffiths cries out for much more comprehensive standards for weighing anthropological data and indigenous witness testimony than was suggested in Yorta Yorta. Though the High Court majority in Yorta Yorta touched upon a few requirements of lower courts in weighing indigenous oral testimony and documentary ethnographic accounts, its decision has failed to correlate sufficiently these disparate forms of analysis. The nature of

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105 Id.
107 Griffiths, F.C.A. 903 ¶ 577–84.
109 Id. at 447–51, ¶ 57–70.
ethnographic data has not yet been adequately recognized by Australian common law. Oral testimony and ethnographic accounts from the late 19th or early 20th century tend to diverge, not simply due to an evident change in traditional laws and customs, but often because of a failure of the Western ethnographer to obtain an accurate understanding of native customs and traditions. The rudimentary theoretical foundations of early anthropology were severely misinformed by their Europocentric conceptions of concrete categories of how a society is formed. Anthropology has in recent decades come to reform these pitfalls of earlier generations with great vigor. At the same time, however, this project of reform has been such an extreme reaction to "classical" ethnography that the increasing refusal of many contemporary anthropologists to adhere to any empirical standard has rendered their opinions valueless in a court of law.

Thus, trial judges, whose Western legal training is intrinsically incapable of comprehending the complex nature of indigenous Australian land systems relevant to native title proceedings, continue to reserve discretionary authority in treating the distinct forms of evidence relevant to native title. The next section demonstrates the iniquitous treatment between indigenous oral evidence and ethnographic documentation is demonstrated. The generous inference always granted to ethnographic documentary evidence is too often coupled with the irrational hesitancy of

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110 See Peter Sutton, Native Title in Australia: An Ethnographic Perspective, 137–38 (describing shift in anthropological theory from crippling rigid formalism to improved recognition of fluidity in non-Western social structures during the 1970s).

111 See id. at 138 ("There has been a positive and general shift in Australianist anthropology away from structuralist emphases on relatively rigid social and cultural forms . . . towards greater recognition of their negotiability and fluidity as meanings.").

112 See generally id. at 144–46 (beseeching contemporary anthropologists to teach multiple "modes" of ethnographic theory, for the sake of fostering greater judicial reception of anthropological experts).

113 For example, despite a rare but clear warning in Yorta Yorta against "the impermissible premise that written evidence about a subject is inherently better or more reliable than oral testimony on the same subject, Yorta Yorta, 214 C.L.R. 422, 449, ¶ 63, Judge Sackville in Jango blatantly contradicts the High Court majority by asserting, "in the absence of a written tradition, there are no indigenous documentary records that enable the Court to ascertain the laws and customs followed by Aboriginal people at sovereignty. While Aboriginal witnesses may be able to recount the content of laws and customs acknowledged and observed in the past, the collective memory of living people will not extend back for 170 or 180 years." Jango v. N. Territory of Austl. (2006) 152 F.C.R. 150, 279–80, ¶ 462. This, he presumes, is why "anthropological evidence [is necessary] to establish the link between current laws and customs (or those observed in the recent past) and the laws and customs acknowledged and observed by the claimants’ predecessors at the time of sovereignty." Id. Judge Sackville ultimately denied the claim in Jango on account of the superior position he impermissibly granted to anthropological evidence from early 20th century ethnographies. Such a defect in Jango merely scratches the surface of the difficulties encountered in weighing the complex evidence typical to native title proceedings."
many trial judges to afford a comparable inference to indigenous oral evidence. Connecting anthropologists to judicial rationality for the sake of better informing the court upon the relationship between oral evidence presented by indigenous witnesses and older ethnographic accounts is the subject of the remainder of Part II. External expertise must obtain a greater role in native title proceedings so that administration of justice may be rational and accurate in ascertaining if the traditional nature indigenous laws and customs have been preserved.

**B. The trouble with history as evidence: finding equality in the use of legal inference to presume historical fact**

The relevant criterion to be applied in deciding the significance of change to, or adaptation of, traditional law or custom is readily stated (though its application to particular facts may well be difficult). 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?\(^{114}\)

Indeed, though the standard might be easy to restate, there is great obstacle in applying it to the proof normally pertaining to whether the indigenous laws and customs found in contemporary practice can be seen to be the traditional laws and customs existing at the time British sovereignty came over the lands in question. Though documentary evidence from the 19th century that is typically ethnographic or anthropological in nature does exist, it is unbelievably rare for any such data to extend back to the moment of sovereignty.

In many cases it is even impossible for any relevant documentation to exist. In *Jango*, for example, though the relevant date of sovereignty is 1825, the earliest documentary evidence, on the other hand, could not precede the first explorers to the region, who arrived in 1873.\(^{115}\) Sovereignty in *Griffiths* was also found to have been asserted in 1825, but the first anthropologist to have carried out "detailed empirical research" was Professor Stanner, who visited the relevant communities no earlier than


\(^{115}\) See *Jango* 152 F.C.R. 150, 180–81, ¶ 110 ("The earliest European explorations of the Uluru region were in 1873, by the explorers William Gosse and Ernest Giles.").
Out of sheer necessity, fact-finders in native title claims must make inferences to bridge the gap between the earliest documentary evidence and the date of sovereignty which is the legally relevant date. If federal judges in their discretion were to decide that no claim should succeed if evidence did not demonstrate tradition dating back to the moment of sovereignty, indeed, "no native title claim could ever succeed in the Northern Territory, or perhaps in any other part of Australia."

The evidentiary problem affecting analysis of change to traditional laws and customs arises when the fact-finder must evaluate the anthropological and ethnographic records for the sake of the law, and then also weigh the content of such European writings with indigenous witness testimony recollecting oral traditions in great part. Though the courts appear comfortable in affording an inference in favor of ethnographies towards the date of sovereignty, the skepticism of many judges will presume not to afford the same inference to indigenous testimony. Had Judge Sackville not mistakenly declared his use of the presumption against oral tradition specifically forbidden in Yorta Yorta, his bias against oral tradition could have hidden behind the shield of discretion. This iniquitous possibility ought not to threaten native title claimants.

Relying upon common law evidentiary practice dating back to feudal England, Judge Weinberg in Griffiths has justified an inference in favor of native title claimants: For the sake of fairness, traditional laws and customs may be inferred from a cultural tradition of oral history in limited instances of customary land use:

Referring to the difficulty that the evidence could not literally take the Court back as far as 1788, [Selway J] observed (at [197]):

"This problem is one that is well known to the common law. There are a number of circumstances where it was necessary at common law to establish proof of custom dating back not just to the 18th century, but to 'time immemorial'. Proof of copyhold was one example ... Another, ... was the proof of ancient custom as a means of establishing either prescription or ancient lost grant 'from time immemorial'."

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116 See Griffiths v. N. Territory of Austl. (2006) F.C.A. 903, ¶ 271 ("Professor Stanner was the first anthropologist to carry out detailed empirical research in the area. As a young man he visited Timber Creek for about a week in August or September 1934.").

117 See, e.g., Yorta Yorta, 214 C.L.R. 422 (leaving trial judge's use of ethnographies dated well after sovereignty unchallenged, much less undisturbed).

118 Griffiths, F.C.A. 903, ¶ 432.

119 SUTTON, supra note 110 and accompanying text.
His Honour noted that, like the evidence called to prove aboriginal custom, the evidence called to prove the existence of a custom from "time immemorial" for the purposes of the common law was often oral evidence and it was subject to the same difficulties in relating that evidence back—although not just to the eighteenth century, but to the twelfth and thirteenth centuries. In practice, those difficulties were ameliorated by the readiness of the common law courts to infer from proof of the existence of a current custom that that custom had continued from time immemorial. The inference was a strong one: *Hammerton v. Honey* (1876) 24 WR 603 at 604 per Jessell MR.

There is no reason why the same evidentiary inference is not available for the purpose of proving the existence of aboriginal custom and tradition at the date of sovereignty.\(^{120}\)

Certainly the inference need not always be afforded. However, in the absence of contrary evidence, such oral evidence in itself should suffice to establish a connection between traditional laws and customs and contemporary practice. It is where the oral testimony and the ethnographic data of documented history conflict that this inference shall face a substantial challenge, against which it may or may not ultimately survive into the findings of fact.

C. Ethnographic data, expert anthropologists, and indigenous oral history: How should legal analysis of traditional laws and customs ruminate the anthropological view of culture?

1. *The common law must come to define the utility and the role of anthropological expertise in interpreting evidence relevant to native title*

The High Court in *Yorta Yorta* noted that "[n]ative title is not a creature of the common law."\(^{121}\) Sadly, the common lawyer and judge for the most part has been unable to situate his knowledge beyond the formal training of Western law and letters for the sake of more accurate comprehension of native Australian customs and society. The significant role afforded to anthropologists in native title cases, such as *Jango* and *Griffiths*, indicates some redress of this ignorance in the common law; however, the weighing of anthropological expertise today not only suffers from a lack of systematic treatment from judges, but also the fact that the

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\(^{121}\) Members of the Yorta Yorta Aboriginal Cmty. v. Victoria (2002) 214 C.L.R. 422, ¶ 75.
broad spectrum of anthropological theory has not yet been translated precisely into terms familiar to the common law. Anthropology is a field founded conceptually in contradistinction to native title law, and thereby it must find proper expression in the courtroom for the courts to comprehend, adopt, and integrate anthropological understanding of native Australia into native title case law.

If anthropology is the study of culture, the anthropologist should initially feel slighted to discover that nowhere in the statutory definition of native title or the statutory requirements of a native title determination is "culture" or "society" even mentioned. Since Yorta Yorta, though, the High Court has cemented "society" into the native title vocabulary and the place of anthropologists at the center of the evaluation of traditional laws and customs. This insertion of social science into native title claims has been disconcertingly haphazard so far, and thus the rules for weighing anthropological evidence have not yet attained a sufficient standardization in the four years since Yorta Yorta was decided. Quite frankly, the complexity of anthropology's inconsistent theorizing about "society" and "culture" over the last 140 years is making quite clear that native title claims require more standardized treatment of expert testimony and the ethnographic facts upon which they rely.

Furthermore, the very nature of defining native title and determining whether it exists in a given case creates another fundamental obstacle to reconciling anthropological conceptions with the legal principles that provide native title recognition under the common law.

The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the NTA. The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them.

\[\text{References:}\]

122 See W. Austl. v. Ward (2002) 213 C.L.R. 1, 64-65, ¶ 14 (acknowledging that the fractured view which the common law takes of indigenous Australian laws and customs relating to native title does not faithfully reflect the holistic nature of culture).

123 Yorta Yorta, 214 C.L.R. 422, 445, ¶ 49.

124 As much as some anthropologists may cringe and this prospect of limitations, the federal courtroom has a place only for those experts willing to correlate their conclusions to the evidence relevant to the native title claim before the court.

125 Ward, 213 C.L.R. 1, 64, ¶ 14.
The integrated viewpoints of anthropological experts and ethnographies shall not fragment naturally or neatly for the sake of native title claims. Verily, in native title claims especially, lawyers should be "involved in the writing of the reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed." In communicating anthropological knowledge of traditional laws and customs, experts must be able to translate the relevant ethnographic data into a legally comprehensible conclusion to the question: have the native title claimants substantially maintained the laws and customs of their ancestors, who were present at the time of British sovereignty, that contemporary practices may be considered "traditional"?

Alas, both judges and anthropologist expert witnesses have not yet come to conceive of what is fundamentally necessary for the content of anthropological expert opinions or ethnographic data to be analyzed properly. For example, the primary judge in *Yorta Yorta* relied upon late 19\textsuperscript{th} and early 20\textsuperscript{th} century ethnographies, due to the absence of meaningful expert interpretation by a present-day anthropologist. Most anthropologists will find this shocking due to theoretical developments in the field since the 1970s. What anthropological expert witnesses generally fail to understand are the evidentiary requirements of the law that their expert opinions and conclusions be based upon evidence submitted in relation to the particular traditional laws and customs at issue. When Judge Olney observes that "[t]he Court has derived little assistance from the testimony of the various experts who have given evidence in this proceeding and this because apart from the recorded observations of Curr and Robinson, much of the evidence was based upon speculation," it exemplifies the common failure of anthropologists to provide legally helpful interpretations of the evidence before the Court.

As much as it must disturb present day Australian anthropologists to learn the ethnographic conclusions of the colonial period, which have been criticized in their fundamental premises and identified to be in need of serious theoretical revision, they are often given more weight in native title


\textsuperscript{127} See Members of the Yorta Yorta Aboriginal Cmty. v. The State of Victoria & Ors (1998) F.C.A. 1606, ¶ 106 (stating that the oral testimony of witnesses is further evidence but, being based upon oral tradition extending over two hundred years, such testimony should be given less weight than scholarly writings).

\textsuperscript{128} SUTTON, supra note 110.

\textsuperscript{129} *Yorta Yorta*, F.C.A. 1606, ¶ 54.
proceedings than their own modern interpretations of culture. The basic logical requirement of the Australian common law that "all the facts assumed by the expert as the basis for his or her opinion [correspond to] those proved or admitted" condemns the uninhibitedly speculative postmodernist emphasis growing within the academic discipline of anthropology to continue its existence outside the realm of beneficial utility in native title claims. Even though "it is easy for [anthropologists] now to identify the distorting effects of the assumptions and values of the ethnographers of a century ago . . . there seems to have been a serious decline in the extent to which empirical rigor is required of an academic ethnographer and anthropological writer in recent decades." The common law will not tolerate postmodernist ethnography spouting unstructured discourse immaterial to deciding native title claims; "[b]all that as it may, the Court must address the evidence that is before it and to the extent that it admits of firm findings, make such findings as are relevant to the case." Modern anthropologists who participate in native title claims must articulate a clear critique of ethnographic evidence which was collected prior to the academy-wide awakening upon publication of Anthropology and the Colonial Encounter and the like during the 1970s. It is fundamental for every anthropological expert witness to explain that great care must be taken to avoid vesting too much reliance upon older ethnographies merely for the fact that they have preserved interpretive observations in writing. In fact, the court must be asked to understand that the limitations of ethnographic observation under the guise of objective research have led to the "corrective" undertaking by the contemporary generation of anthropologists. Primary judges in native title claims cannot be presumed to know that Australianist anthropology has shifted "away from structuralist emphases on relatively

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130 See, e.g., Yorta Yorta F.C.A. 1606 (presuming uncritically that nineteenth century ethnographic documentary evidence is anthropologically accurate).
132 See generally Sutton, supra note 110 and accompanying text.
133 Id. at 145.
135 See Sutton, supra note 110, at 138 (describing the anti-Europocentric revision of Australianist anthropology).
136 See, e.g., Jango v. N. Territory of Austl. [2006] 152 F.C.R. 150, ¶ 477 (testifying on the patrilineal modes of descent, Professor Sutton described that, "the anthropological accounts, prior to the work of Myers in the 1970s and 1980s, were: 'coloured by some bias towards the search for order and structure and tended, for example, to give too much emphasis to the ideological statements of older men in contrast with the attention given to the messier realities of the case material'".).
rigid social and cultural forms, and on cellular and segmentary analyses of those forms as if they were objects in space-time, towards greater recognition of their negotiability and fluidity as meanings. It is incumbent upon experts to explain the academy-wide critique of earlier ethnographic premises and theories and the need to revise such interpretations through a modern lens.

2. The relative weight of ethnographic data and indigenous interviews/testimony in relation to expert anthropological interpretations

More importantly, anthropological expert witnesses must remain within the evidence relevant to the proceeding at hand; to do otherwise shall always lead to the dismissive complaint by Olney J. However, the exercise of a similar complaint in Jango by Judge Sackville is utterly incorrect. His Honour’s dismissal of Professor Sutton’s Report and expert testimony suffers from an improper evaluation of ethnographic materials in relation to Professor Sutton’s contemporary anthropological interpretation of relevant historical data collected in older ethnographic materials. Although His Honour does provide some reasoned explanation to find that Sutton failed to review completely the relevant ethnographic data collected by Tindale, he fails to address the superior nature of Sutton’s report in the context of the native title proceeding itself. Not only did his report reassess a great deal of Tindale’s ethnographic data (inter al.) to determine that a broader cognatic kinship system existed as far back as ethnographers recorded relevant data, but, more importantly, Professor Sutton also weighed oral evidence from the claimants. Even though His Honour does articulate the premise that "the evidence of the Aboriginal witnesses provides the most important evidence in a native title case," Judge Sackville’s refusal to consider that the indigenous oral tradition presented in testimony could extend to the moment of sovereignty is an error of law that exerts a prejudicial reliance in error upon Tindale over Sutton and several other ethnographic accounts.

The fundamental defect in Judge Sackville’s according greater weight to Tindale’s ethnographic records is his failure to account for the fact

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137 SUTTON, supra note 110, at 138.
139 See Jango, 152 F.C.R. ¶ 312 (commencing field work for his research, Sutton and Ms. Vaarzon-Morel completed a joint report that entailed at least 398 days of ‘desk research’ and ‘non-ethnographic interviews’ and 99 days of ‘ethnographic field work’).
140 Id. at 152 F.C.R. ¶ 288.
that Professor Sutton is familiar with both the claimants in the case before the court and with the legal questions involving the continuity of traditional laws and customs in the native title claim at hand. Sutton's familiarity makes his report fundamentally superior to freestanding ethnographies written in an earlier period of unreformed social theory long. Were Professor Sutton's Report to be insufficient in its correlation to the evidence on record, then Judge Sackville's error would not be prejudicial. However, Judge Sackville's several errors bring into question his very findings of fact, which must first be rectified before any court may review the extent to which the Sutton Report contains "correspondence between all the facts assumed by the expert as the basis for his or her opinion, and those proved or admitted."141

Professor Sutton is, in fact, one of the most well prepared anthropologists for answering the questions which the Australian common law poses, as evidenced by his extensive work at the intersection of anthropology and law.142 His efforts to bring a common vocabulary where these professions overlap provide the leading contemporary example of the direction in which anthropological expert testimony must foray. Though Sutton has not perfected the translation of anthropological theory into relevant legal evidence, his contribution has been foremost in attempting to educate anthropologists about the need for fact intensive analysis if judges are to find their interpretive conclusions at all persuasive.143

Conversely, judges must come to better understand the enormous potential that anthropological interpretations may hold for their evaluation of evidence and findings of fact.

3. The advantage of anthropological inquiry in understanding indigenous evidence for native title

In Yorta Yorta, the High Court failed to address how primary judges should evaluate ethnographic writings and how primary judges should approach present-day anthropological expert witnesses who may evaluate the quality of those writings. The fact that present-day anthropologists directly interact with native title claimants should provide their expert opinions with

142 See generally SUTTON, supra note 110 (pioneering the intersection of Australianist anthropology and the law of native title).
143 Id.
greater weight than de-contextualized ethnographies from past generations. Judge Sackville, however, declared that:

Expert anthropological evidence is unlikely to cure certain kinds of gaps or deficiencies in evidence adduced from Aboriginal witnesses. If, for example, indigenous witnesses consistently disclaim a suggestion that their traditional laws and customs allow interests in country to be acquired in a particular manner, evidence to the contrary by an anthropologist is unlikely to carry a great deal of weight. This will be so even if the anthropologist’s evidence is not directly challenged in cross-examination, since evidence from indigenous witnesses is normally regarded as providing the most reliable account of traditional laws and customs of the relevant people.144

Such a view of expert anthropological evidence fails to comprehend the interpretive assistance of indigenous witness testimony. Though Judge Sackville recognizes the difficulties inherent in having indigenous witnesses on the stand in a courtroom,145 he nonetheless marginalizes the utility of anthropologists in their professional interpretive ability to convey a holistic summary of indigenous accounts of traditional laws and customs in a setting more comfortable for indigenous people.146 For example, outside of the courtroom, an anthropologist may simultaneously engage more than one native title claimant in dialogue. This is vitally important, especially in regard to evaluating descent and kinship for traditional content. Professor Sutton notes the following in his recent study of native title:

Working out what kinship relation holds between oneself and a newly encountered person may take some time, unless the relationship is found to be fairly close. The solution to the calculation problem usually focuses on a meaningful relationship each person holds to a common third party....One may trace such a connection in more than one way, through more than one third party, and thus end up able to define the mutual kin connection in more than one potentially acceptable way...Disjunctions often occur, especially in cases where unrelated or very distantly related people interact as kin. For example, of two men who call each other brother, one may call a third party ‘mother’ while the other calls the same woman ‘sister,’ tracing (or ‘tracking’) their kin connections via distinct pathways to the same

146 See id. ¶ 291 (opining that expert anthropological evidence will not fix certain deficiencies in evidence from Aboriginal witnesses).
person. There is no particular pressure, in my experience, to regularize these triangular cases of apparent disharmony.\textsuperscript{147}

The significance of anthropologists' interviewing native title claimants, as a means of clarifying—nay, translating indigenous accounts of traditional laws and customs for the sake of a Western judiciary, was recognized in \textit{Griffiths}. Judge Weinberg was careful to realize how formal testimony in earlier land rights' claims could mislead a fact-finder about the nature of the kinship system:

A number of the indigenous persons who gave evidence before Commissioner Maurice referred to their countries by reference to male ancestry only. They listed themselves, and members of their patriline, first, when responding to questions about responsibilities for sites, and their links with country. However, according to Dr Palmer and Ms Asche it was significant that these same witnesses also recognised matrilineal inheritance, and indeed, recognised that an interest in country might be able to be gained by other means as well.\textsuperscript{148}

Judges are not the only persons who may be misled to see a strict patrilineal system of descent in tradition that has out of nowhere inserted a cognatic one. The earliest ethnographic account used in \textit{Griffiths} for historical data, that of Professor Stanner, was impeached by both the Northern Territory's and claimant's experts, for "Professor Stanner had been wrong in relation to . . . his notion that patrilineal descent operated universally throughout Australia."\textsuperscript{149} In fact, the patripotestal tradition of English mores themselves has been a most difficult plank in the eye of Western anthropological theory. As the experts on behalf of the native title claimants in \textit{Griffiths} explained:

Dr Palmer and Ms Asche say that neither the anthropological evidence, nor the scholarly literature upon the subject, provides a concluded or agreed view on these questions. They say that until approximately twenty or so years ago, there was undoubtedly an assumption among anthropologists that country groups were patrilineally recruited. However, evidence produced as a result of extensive research into land claims has shown that this may not in fact have been the case. In

\textsuperscript{147} SUTTON, supra note 110, at 176.
\textsuperscript{149} Id. ¶ 450.
addition, it is now clear that rights to country can be gained in a number of ways, patrilineal descent being but one.  

Judge Weinberg in *Griffiths*, in contrast to Judge Sackville in *Jango*, benefits from the presence of experts who have properly considered the relevant evidence representing the opposing parties. Although some of Professor Sansom’s interpretations in *Griffiths* are contrary to the legal rudiments of native title, he and the claimants’ experts, Dr. Palmer and Ms. Asche, provided useful expertise for the sake of the native title claim at stake. By analyzing evidence relevant to the proceedings at hand and grounding their expert conclusions upon that evidence, Judge Weinberg was able to settle *Griffiths* based upon comparably qualified expert testimony. As every primary judge handling a native title claim should recognize, His Honour has effectuated the appropriate standard for augmenting difficult indigenous witness testimony with qualified expert interpretation seeking to clarify what indigenous witnesses meant:

The real factual dispute in this case turns not upon the primary facts adduced through the indigenous witnesses, but rather upon what interpretation should be placed upon those facts. Each side relied heavily upon anthropological evidence in support of its case. In the end, I am required to decide, as between Dr. Palmer and Ms. Asche, and Professor Sansom, whose interpretation of those primary facts I prefer.

That neither the Commonwealth nor the Northern Territory provided an anthropological expert in *Jango* to counter Professor Sutton’s report improperly left the task of rebuttal to Judge Sackville. The absence of a Commonwealth expert left the government relying heavily upon the ethnographic data of Tindale without any relationship between that older data and the indigenous witness testimony elucidated on the Commonwealth’s part. Furthermore, it is highly misleading to rely upon older ethnographic data alone, without modern interpretation, due to the

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150 Id. ¶ 350.
151 See, e.g., *Griffiths*, F.C.A. 903, ¶ 388 (dismissing any inference in favor of finding tradition dating back to 1825, as no evidence exists that far back).
152 Id. ¶ 475.
significant changes that have occurred to the discipline of anthropology, especially in regard to kinship and descent of rights.\textsuperscript{154}

4. Summary of evidentiary reforms recommended

In sum, anthropologists who willingly and intentionally participate in native title claims for either a government or a claimant need to ensure that their expert testimony or report to the court remains empirically tied to both the ethnographic and indigenous witness evidence. Conversely, trial judges must come to realize the very different dialogue that indigenous witnesses have with anthropologists. Rather than being asked to step into a very foreign forum for the purpose of answering unilateral questions that draw an arbitrary and misleading line of "precise" factual findings, native title claimants are approached by anthropologists on the terms of the indigenous culture for the sake of inquiry.

The anthropological inquiry that strives to be open-ended should in fact improve the efficacy and justice of the native title claims process. The tendency of a good number of anthropologists to abstract broad interpretive conclusions about "traditional" society without providing relevant historical evidence and indigenous witness evidence renders such opinions unacceptably valueless to a common law judge. Even if "structural" analysis is offensive to the anthropological expert, such simplified structural presentations may provide a clear means to critique reductionist and rigid views of what may be far more elastic normative systems reflecting traditional laws and customs.

At the same time, historical evidence of traditional laws and customs gleaned from older ethnographic texts is, without adequate modern reinterpretation by an anthropological expert, a substandard means of making any finding of fact in a court of law. Ideally, each side in a native title claim should present at least one expert witness to assist the primary judge in comprehending the difficult nuances of the traditional laws and customs at issue. One would imagine that such systematic presentation and weighing of evidence in native title cases would improve the legal recognition of surviving indigenous traditions in Australia.

\textsuperscript{154} See Griffiths v. N. Territory of Austl. [2006] F.C.A. 903, ¶ 350 (concluding that the concept of patrilineal descent has changed over time).
IV. Part III. Conclusions of law and interpretations of culture: finding the "normative" principles of kinship

A. Incremental expansion of native title law: common law analogizing

Our comparison of the judicial treatment of indigenous kinship systems in Jango and Griffiths has not yet yielded an answer to the singular question: Is a transition from a patrilineal system of descent to a cognatic one "adaptive," thereby qualifying as "traditional," or is such a move to be considered the result of "parallel-law making," an impermissible innovation to indigenous tradition that causes native title rights and interests to implode? Our analysis must come to understand what tradition of indigenous law and customs defines the normative system of the indigenous society before the court.

When the High Court developed its "normative system" test in *Yorta Yorta*, it was mindful of the following:

[R]eference to a normative "system" of traditional laws and customs may itself be distracting if undue attention is given to the word "system," particularly if it were to be understood as confined in its application to systems of law that have all the characteristics of a developed European body of written laws.155

With such admonishment, however, no conceptual guidance was provided to help judges who were educated within the Western legal tradition to understand the distinctive characteristics of indigenous Australian normative systems. We herein suggest a conceptual distinction at this intersection of normative systems; the following discussion in the rest of Part III is intended to assist in bridging the gap between indigenous Australian legal traditions and Western ones. If the High Court of Australia can be consistent in its cautious approach to expanding any field of law, "the law should develop novel categories . . . incrementally and by analogy . . . rather than by a massive extension" of what constitutes traditional laws and customs.156 Rather than expect judges trained in the Western tradition to adapt instantly to the complexities of indigenous Australian civilizations, we suggest that ancient Roman legal concepts may offer an interpolated perspective between indigenous Australian and British systems of law and custom.

There are, in Roman terms, four types of law relevant to understanding the difference between indigenous Australian and European normative systems. The primary term for use in the native title context is "mos" (customary law). Mos arguably constitutes "traditional laws and customs" entirely. An important corollary to mos, however, is "ius" (human law). Ius may represent either a person's individual rights or the enforcement of a socially prevalent normative value. Not only is ius distinguished from fas (spiritual law), but it is also not coterminous with lex (written law). Ius need not refer to written law alone, though Western societies have increasingly associated ius primarily with written code (e.g., Justinian Code is also known as corpus juris civilis).

The development of written law in the United Kingdom, by the time that the British Empire came to declare sovereignty over the Australian continent, had become so ingrained that the obvious absence of lex among indigenous Australians led to the tragic inference that ius also did not exist on the continent. Such reasoning by the British led to the adoption of the doctrine of terra nullius in the settlement of Australia. Only in 1992 did the High Court refuse to maintain such a fiction any longer.

Alas, the High Court of Australia has only taken a partial step to cure the ill effects of terra nullius. Whereas prior to Mabo Australia utterly failed to recognize any indigenous system of law relating to land, after Yorta Yorta it is now clear that the common law conception of native title too greatly analogizes its own format to the clearly distinct and foreign body of traditional laws and customs. That the majority in Yorta Yorta would articulate that "only those normative rules [of ancient origin] . . . are 'traditional' laws and customs," and that "[after] the assertion of
sovereignty by the British Crown . . . there could . . . be no parallel law-
making system," could easily cause a trial judge to misidentify traditional
laws and customs as comparable to the general characteristics of European
written laws. In other words, in the absence of indigenous lex, the common
law's recognition of native title must come to examine and comprehend the
exclusive interplay of ius, fas, and mos within indigenous Australian
societies. In recognizing the traditional laws and customs of indigenous
Australian societies, the courts must give real effect to the settled principle
that "[n]ative title is not a creature of the common law" and that native title
emerged in Australia prior to the arrival of British sovereignty demands
unique treatment within the common law, in accordance with the nature and
content of anterior traditional laws and customs.

B. Anthropological critique and apologies: the Western academy at the
intersection of methodology and empathy

Our treatment of the facts in both Jango and Griffiths demonstrates that anthropological experts not only may be uniquely qualified
for interpreting native title evidence, but are even necessary to assist the
court in understanding, for example, that "patrilineal" preference in aboriginal Australian cultures is not the same as the rigid patrilineal rules of
descent practiced in England until the 20th century. Thus Professor Sutton
is careful to identify "classical" aboriginal Australian systems of kinship to
be most commonly "patrifilial," if not "patrilineal." In Griffiths, Dr. Palmer
and Ms. Asche successfully convey to Judge Weinberg the following:

[D]escent at Timber Creek is reckoned as cognatic, although there
would appear to be some preference for claiming country via
patrifiliation . . . . Given the complex and rich nature of the social
relationships that underpin the commensality of the country groups
discussed here, it appears unlikely to us that this represents an
innovation . . . [by] a society that was characterised by autonomous and
hermetic patrilineal groups.

\[id. at 443-44, ¶ 44.\]
\[id. at 453, ¶ 75.\]
\[See Administration of Estates Act, 1925 (abolishing the Anglo-Saxon vestige of primogeniture
from English Land Law).\]
\[SUTTON, supra note 110, at 214.\]
also SUTTON, supra note 110, at 218 ("In practice people may retain a patrilineal ideological bias while de
facto acknowledging non-patrilineal group membership.").\]
The normative system that preceded the arrival of British sovereignty should not be evaluated on the minutiae of rules which are not even "patrilineal" in the British moral sense; rather, "the crucial point is [whether] rights to 'country' . . . are and always have been based upon principles of descent." The fundamental principle of Aboriginal Australian normative systems is "classificatory kinship itself, one of the hallmarks of classical Aboriginal culture, [which] rests on the capacity to recognise everyone in society as belonging to a finite number of kin categories, or kinds of people." Furthermore, the "classical principle of consociation leading to a degree of mutual trust and amity independent of genealogical closeness continues.

On behalf of the native title claimants in Jango, Professor Sutton elucidated just how the simplistic and rudimentary interpretations of earlier ethnography were "'coloured by some bias towards the search for order and structure and tended, for example, to give too much emphasis to the ideological statements of older men in contrast with the attention given to the messier realities of the case material.'" In the absence of an opposing expert who could have fortified or explained the earlier ethnographic accounts upon which His Honour relies despite countervailing indigenous witness testimony, Judge Sackville failed to recognize the complexity imbued in Aboriginal Australian kinship systems, reducing the Western Desert to a hermetic patrilineal system of descent in his findings of fact. On account of the claimants’ pleading that a broader system of descent had always been in traditional practices of the Western Desert, Judge Sackville refused to evaluate whether a transition from the patrilineal system of his own perception to the cognatic one in the claimants’ pleading is an adaptation within the meaning of Yorta Yorta, or an innovation that extinguishes the force of traditional law and customs. Judge Sackville clearly insinuates that, had they asked him to address that question, he would not have received it favorably.

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His Honour, in his own words, summarizes his finding regarding descent as follows: "In short . . . I find that there has been a gradual shift from a patrilineal to a cognatic system, and that this shift continues today . . . The shift to cognation is one of emphasis and degree." Griffiths, F.C.A. 903 at ¶ 501.

173 SUTTON, supra note 110, at 215.
174 Id.
176 Id. ¶ 501.
177 See id. ¶ 501 ("Specifically, the applicants do not contend that if the content of the traditional laws and customs was as I have described, those laws and customs contemplated the virtual abandonment
Even if we accept Judge Sackville’s finding that patrilineal descent was the version of kinship practiced in the Western Desert at the moment of sovereignty, as a matter of law, the changes he found to have occurred in the indigenous system of descent should have nevertheless been evaluated under Yorta Yorta’s test for a traditional connection. It would be a severe injustice if analysis of the system of descent examined indigenous Australian rules of descent as if they were statutory amendments to Acts of Parliament. The notion of a "parallel law-making" system announced in Yorta Yorta has thus been misleading in Jango.

The common law of Australia cannot uncritically apply inapt analogues from the cultural, moral, and legal foundations of the British Empire to the law of native title. When normative rules of kinship are judicially scrutinized for evidence of a substantially maintained tradition within indigenous laws and customs, the factfinder must calibrate their analysis to determine specifically whether "the anthropological data, and the ethnography, indicate an enduring continuity of belief and practice which developed from a fundamental cultural system that underpinned the society in question."  

V. Concluding remarks

Mabo remains a landmark effort to seek meaningful compromise between the Australian sovereigns and the indigenous systems of laws and customs which are so utterly unfamiliar to the common law. The High Court decision in Yorta Yorta appears to have been an attempt to formulate more rigorous requirements of native title claimants than Justice Brennan had articulated in regards to the maintenance of tradition: whereas Brennan had declared broadly that "[i]t is immaterial that the laws and customs have undergone some changes since the Crown acquired sovereignty provided the general nature of the connection between the indigenous people and the land remains." Through Yorta Yorta the High Court has elaborated that this "general nature" be evident in a normative system of traditional laws and customs, whose content has been so substantially maintained that the connection to land constitutes native title rights and interests. The High

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of patrilineal descent and the acceptance of an ill-defined and far-reaching 'kin links' principle identifying ngurrarija for country.

178 Id ¶ 505.
Court’s decision in *Yorta Yorta*, however, has exposed as much anxiety as it has resolved, and its meaning must be further elucidated in light of lower court decisions relying upon its precedent.

Although this paper does emphatically critique the open-ended nature of the holding in *Yorta Yorta*, the hasty manner in which the British Empire inaccurately codified traditional indigenous laws and customs relating to land in Fiji admonishes present day post-colonial governments that anthropological accuracy in native title will increase the measure of justice. The common law properly requires more time to integrate ancient systems of land tenure into its own stubborn principles of property. Even though the growing pains of native title law continue to confound so many persons on each side of the imperial frontier, in truth the Commonwealth of Australia shall ultimately serve justice better if its High Court takes the time to consider the reasoning of such decisions as *Griffiths* and to review such defective holdings as *Jango*.

As convenient as it would be for native title law to have been resolutely delineated in 1992—nay, even in 2002—in truth, NTA § 223(1), whether interpreted by Noel Pearson or the majority in *Yorta Yorta*, has been wisely constructed with deference not only to the High Court decision in *Mabo*, but also to the common law in posterity. The federal courts are the most qualified representative of Australian sovereignty to investigate what truly constitutes "native title," "native title rights and interests," and "traditional laws and customs." The common law of Australia must, however, make a much stronger effort to obtain an intersubjective and more accurate understanding of indigenous cultural norms and practices. It must not only seek to recognize native title rights and interests, but it must also reconcile the stubbornness of our ancient Norman presumptions underlying the common law of property with the distinct and unique features which set apart indigenous "traditional laws and customs." Native Title in Australia has yet to reach a point in its development when history can draw any conclusions about the extent to which the courts and legislatures have succeeded in providing indigenous Australians with access to substantial justice. Whithersoever is steered the law of native title in the wake of *Yorta Yorta*, it remains to be seen if the hope borne out of *Mabo* shall emerge out of its current desperation or revert to the numbing emptiness of *terra nullius*.

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