Conceptualising Native Title

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1. Introduction

Native title was recognised within the common law of Australia and, as a result, its nature is affected by the traditions and habits of that body of law. Despite legislative intervention through the *Native Title Act* 1993 (Cth), the development of common law native title has been left, largely, to the courts. The concept of native title has changed as the law has developed but these changes have not necessarily led to a more coherent understanding of native title. With the appeals in the *Miriuwung Gajerrong* and *Croker Island* cases to be heard before the High Court in February and March 2001,[1] it is timely to review the doctrine of native title that has emerged.

The central questions in seeking to understand the concept of native title at common law are 'how' the common law seeks to recognise native title within Australian law; and 'what' it is that the common law is recognising. Underlying these two questions, however, is a more fundamental question: 'why' does the common law recognise native title? What is the purpose to which recognition is directed; what is the policy or the jurisprudential foundation for native title?

It is an ambitious project to address the meaning of native title and therefore one that has been avoided to a large degree. One notable exception is Noel Pearson who suggested that 'our inability to articulate clearly the concept of native title has implications ... [for] our understanding of its recognition, its extinguishment and its content'.[2] The purpose of this article is to examine the different approaches of the courts to the content of native title and the extent of recognition to elicit how each of these approaches reflect or reveal the underlying purpose of recognising native title.

I begin this examination with the original conception of native title in *Mabo v Queensland (No. 2)* (hereinafter *Mabo*)[3] and some of the key questions that arose from that decision. This paper draws on the tensions that have emerged in the doctrine of native title, between the view of native title as a bundle of rights versus the view of it as interest in land, to examine what is being recognised by native title. The direction that the courts have taken has led some commentators to call for a conception of native title that more closely reflects a common law tenure

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1 Being appeals from the Full Federal Court decisions in *The State of Western Australia v Ward & Ors* (2000) 170 ALR 159 (hereinafter the *Miriuwung Gajerrong appeal*); and *Commonwealth of Australia v Yarmirr* (1999) 168 ALR 426 (hereinafter the *Croker Island appeal*).

2 Noel Pearson, 'Concept of Native Title at Common Law', Northern and Central Land Councils, *Land Rights Past Present and Future, Proceedings of the Conference on 20 Years of Land Rights*, Canberra, 16–17 August 1996 at 119.

3 (1992) 175 CLR 1.

based on occupation and which moves the focus away from proof of 'traditional law and custom'. However, I argue that there is still a role for Indigenous law that can be reconciled with the underlying rationale for such calls.

Following this discussion, I pursue the question of recognition and the parameters within which the courts have been prepared to extend recognition to Indigenous rights and Indigenous law. The different approaches taken by the courts carry implications in this regard. The doctrine of extinguishment is used to demonstrate the tensions inherent in the idea of native title as a 'recognition space' between Indigenous and non-indigenous law. I argue that the *sui generis*, or unique, character of native title is used to underscore an unnecessary and inappropriate vulnerability in native title. Finally, I return to the underlying purpose of native title as a concept that reconciles the prior sovereignty of Indigenous peoples with the assertion of sovereignty by the Crown. A continued recognition of Indigenous law and custom, as well as occupation, as the source of native title reflects this relationship of competing sovereignty.

The current debates before the High Court, particularly in the *Miriuwung Gajerrong appeal*, raise fundamental questions about the ability of the common law to accommodate the rights and laws of Indigenous peoples if we are to define native title more by what is recognised than by what is taken away. It is imperative that the foundation of the concept of native title be given greater consideration to ensure that it represents the most appropriate foundation for structuring the relationship between Indigenous peoples and the Australian legal system. First, then, I would like to give some further thought to the need to theorise about native title in this way.

2. *The Importance of Theorising about Native Title*

The *Mabo* decision did not exhaustively define the scope and nature of native title, nor would the High Court have intended it to do so. This is not the method of 'judge made law'. Unlike legislation, which seeks to lay down a law of general application and exhaustively set out the limits of its application, the common law develops on a case by case basis. A 'judge made law' or common law doctrine develops over time when a number of cases have arisen dealing with similar issues and which have been treated under the same rule. As difficult circumstances arise, the doctrine is refined or modified in order to do justice in the particular circumstances. Each case forms a 'precedent', which will be referred to in future cases. By referring back to past cases, and treating like cases alike, the law achieves consistency and a coherent doctrine emerges.

The essential element in this common law method is time. It takes time for appropriate cases to come before the courts that demonstrate the facts required to broaden the application of the doctrine. It takes time for enough cases to have been considered by the courts for the doctrine to develop and achieve the theoretical robustness to support the law.

In other jurisdictions, the law relating to Indigenous peoples' rights over traditional lands has also developed through the common law over a significant

period of time. In the United States, a form of title was recognised as far back as 1823.[4] In New Zealand, the law has been developing since 1847 and in Canada, since 1973.[5] In these instances, the number of cases concerning Indigenous rights has been considerable.[6]

In Australia, although the High Court has drawn on the wealth of common law precedent from other jurisdictions, the law of native title has been developed at a rapid pace. From a single decision, legislation was drawn up in an attempt to codify the common law doctrine of native title. In the wake of another decision, the *Wik Peoples v The State of Queensland*,[7] a raft of legislative changes were introduced to revise the codified native title doctrine. While the *Native Title Act* purported to leave the development of native title to the courts, the Parliament unavoidably impinged on the common law conception of native title by enacting legislation.

It may have been unavoidable, perhaps even desirable, to have a legislative response to the *Mabo* decision, given the extraordinary implications of that decision. However, the theoretical and conceptual issues surrounding the recognition of Indigenous rights were not universally understood or agreed. As a result, the cases before the courts must now deal with a conflation of common law and legislative conceptions.

Arguably, it is not always necessary to have a considered and coherent theoretical foundation for public policy, so long as the outcomes are agreed.[8] But for the common law, where outcomes are strongly contested and where the precedential value of a decision lies in its fundamental reasoning, a coherent conceptual framework is crucial. It is even more crucial in an area of law that is as complex, challenging and unfamiliar to the courts as native title.

Native title involves concepts that are not traditionally the domain of the Australian courts, such as collective rights, legal pluralism, and issues of competing sovereignty. It is an area of law where judges cannot always draw on familiar ways of understanding the issues before them. As such, it is imperative that the concept of native title be thought through. This does not mean that a 'comprehensive theory' of native title ever will, or can, be reached. However, there is potential for an agreed foundation for the doctrine. The jurisprudence or philosophy of native title requires further development to ensure that native title does not become a constraining force that works against the interests of Indigenous peoples and against the development of a just and inclusive law.

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4 *Johnson v M'Intosh* (1823) 8 Wheat 545.

5 *R v Symonds* [1847] NZPCC 387; *Calder v Attorney General of British Columbia* [1973] SCR 313; (1973) 34 DLR (3d) 145.

6 For a commentary, see Guntram Werther, *Self Determination in Western Democracies: Aboriginal Politics in Comparative Perspective* (1992) at 67–72. For an examination of many of these cases see *A Guide to Overseas Precedents of Relevance to Native Title*, prepared for the Native Title Research Unit by Shaunnagh Dorsett & Lee Godden, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 1998.

7 (1996) 187 CLR 1.

8 Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 7 *Harv LR* 108 at 1733.

3. *The Nature of Native Title in Mabo's Case*

The passage from the judgment of Brennan J in *Mabo's case*, describing the nature of native title, is now well rehearsed: 'Native title, though recognized by the common law, is not an institution of the common law...' Rather:

> Native title has its origin in and is given its content by the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.[9]

The title was described as *sui generis*, or unique, because it reflected the rights and entitlements of Indigenous peoples under their own laws.[10] To characterise native title in this way was an explicit acknowledgment that native title should not be understood by reference to common law property rights. Instead, however unfamiliar or difficult the task, the court conceived native title as a way to recognise the laws of Indigenous peoples relating to their land.[11]

Noel Pearson sought to explain the relationship between native title and the common law by characterising native title as 'a recognition space' between Indigenous law and the common law where each system recognised the other as a legitimate source of rights and responsibilities.[12] Reflecting on Brennan J's comments, Pearson explained that:

> [t]he High Court tells us in Mabo that native title is not a common law title but it is instead a title recognised by the common law. What they fail to tell us, and something which we have failed to appreciate, is that neither is native title an Aboriginal law title. Because patently Aboriginal law will recognise title where the common law will not. Native title is therefore the space between the two systems, where there is recognition. Native title is, for want of a better formulation, the recognition space between the common law and Aboriginal law which [is] now afforded recognition in particular circumstances.[13]

In this way, native title was understood as a device to allow recognition within the common law of Indigenous peoples' rights over land under their own law. Therefore, the High Court could not prescribe the content of the title, instead

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9 *Mabo*, above n3 at 58–59 (Brennan J). At 88, Dean & Gaudron JJ similarly observed, 'the content ... will of course, vary according to the extent of the pre-existing interest of the relevant individual, group or community.'

10 The preamble to the *Native Title Act* suggests that '... the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands'. The primary object of the Act then, is stated at s3(a) as 'to provide for the recognition and protection of native title'.

11 *Mabo*, above n3 at 58 (Brennan J) acknowledged: 'The ascertainment may present a problem of considerable difficulty.... But once it is acknowledged that an inhabited territory which became a settled colony was no more a legal desert that it was a "desert uninhabited" in fact, it is necessary to ascertain by evidence the nature and incidence of native title.'

12 Pearson, above n2 at 118.

13 Id at 120.

leaving it relatively open. What the court did clearly identify, however, is that the source of the rights and responsibilities recognised and protected by native title are the laws of the native title holders.

As we know, any system of law relating to land involves more than merely a collection of proprietary interests. A community's laws will regulate the transmission of property rights, access to land, responsibilities relating to land, use of resources from the land, and myriad other rights, responsibilities and community controls.[14] There was potential for native title to accommodate Indigenous peoples' aspirations for greater control over their lands.

Subsequent determinations of native title by the Federal Court at first instance, in the case of the Miriuwung Gajerrong and Arrernte peoples for example, recognised many of the related rights and responsibilities.[15] In those cases, the determination of the content of native title included not only the right to 'possess, occupy, use and enjoy' the land, but the right to control access, to use and control the use of resources, to maintain and protect places of importance and to safeguard cultural knowledge.[16]

The difficulty has arisen, however, where native title rights and interests conflict with the rights and interests of others. As noted by North J in the *Miriuwung Gajerrong appeal*, the High Court in *Mabo* was concerned with the existence of native title not with its extinguishment.[17] The need to define the scope and nature of native title as against other interests has become a crucial aspect of the determinations and appeals. The Federal Court has now placed the issue squarely before the High Court in the *Miriuwung Gajerrong appeal*. The two majority judges, Beaumont and von Doussa JJ (North J dissenting), disagreed with Lee J, at first instance, that native title constituted an interest in land, preferring instead to conceive of native title as a bundle of rights amounting to a personal and usufructuary interest. All of the judges attached particular implications to the characterisation of native title in this way, especially with regard to extinguishment.

Despite the change in emphasis, toward extinguishment rather than recognition, in discussing the concept of native title judges continue to rely on the observations of the High Court in *Mabo* reconciling the comments highlighted

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14 *Mabo*, above n3 at 59 (Brennan J), 88 (Deane & Gaudron JJ), for example, discussed the issue of inalienability and succession in relation to the Crown's rights of pre-emption: 'Its alienability is dependent on the laws from which it is derived'. But it is not alienable by the common law. That is, it is not alienable outside the native title group and the traditional law and custom but the common law recognised the group's right to order their internal affairs in this regard. This was further clarified at 61: 'The incidents of a particular native title relating to inheritance, the transmission or acquisitions of rights and interests ... [etc] are matters to be determined by the laws and customs of the indigenous inhabitants ...'

15 *Ben Ward v Western Australia* (1998) 159 ALR 483 (Lee J), (hereinafter the *Miriuwung Gajerrong determination*) and *Hayes v Northern Territory* [1999] FCA 1248 (hereinafter the *Arrernte determination*).

16 'Minute of Order' (Lee J) in the *Miriuwung Gajerrong determination*; and 'Draft Minute of Proposed Determinations of Native Title' (Olney J) in the *Arrernte determination*.

17 The *Miriuwung Gajerrong appeal*, above n1 at 336–337 (Beaumont, von Doussa & North JJ).

above, regarding the unique nature of native title and the role of traditional law and custom, with the place of native title within the common law system of tenure.

4. *The Use of Language in Native Title Cases: A Proprietary Interest?*

The cases to date have contained support for the proposition that native title may constitute a proprietary interest in, or at least in relation to, land, founded on a traditional connection to land. For example, while affirming the unique nature of native title, Brennan J observed:

> If it be necessary to categorize an interest in land as proprietary in order to survive a change in sovereignty, the interest possessed by a community that is in exclusive possession of land falls into that category.[18]

Indeed, Kent McNeil has noted that '"title" would be a misnomer if Aboriginal land rights were not proprietary'.[19]

The court in *Mabo* went to some considerable effort to ensure that they did not prescribe the nature of native title against the existing system of titles and tenures. It was intended that native title be an inclusive and heterogeneous concept in order to reflect the diversity of Indigenous peoples' law and custom. To this end it was acknowledged that the content of native title may vary depending upon the interests of a particular Indigenous community, which form a continuum of rights and interests. Toohey J, in *Wik*, explained that:

> at one end of the spectrum native title rights may 'approach the rights flowing from full ownership at common law'. On the other hand they may be an entitlement 'to come onto the land for ceremonial purposes, all other rights in the land belonging to another group'.[20]

In the same case, Gummow J reiterated:

> The content of native title, its nature and incidents, will vary from one case to another. It may comprise what are classified as personal or communal usufructuary rights involving access to the area of land in question to hunt for or gather food, or to perform traditional ceremonies ... At the opposite extreme, the degree of attachment to the land may be such as to approximate that which would flow from a legal or equitable estate therein.[21]

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18 *Mabo*, above n3 at 51 (Brennan J).

19 Kent McNeil, 'The Post-Delgamuukw Nature and Content of Aboriginal Title' (Draft #3), Delgamuukw National Process Papers, May 2000, at 12.

20 Above n7 at 126–127 (Toohey J).

21 Id at 169 (Gummow J).

However, in trying to avoid defining native title by reference to traditional common law tenures, the judgments have left a confusing collection of analogies and metaphors for what native title may be.

Until the decision of Lee J in the *Miriuwung Gajerrong determination*, judgments had referred to the nature of the interests recognised by native title as an interest in land, in relation to land, as well as a personal or proprietary right. At times this use may have appeared almost interchangeable. Since that decision, however, the debate about whether native title is an interest *in* land or *in relation to* land, has brought to the fore the idea that native title should be characterised as a 'bundle of rights'. The distinction is now seen as important in establishing the strength of the title in relation to other interests in the common law system of tenure and its susceptibility or vulnerability to extinguishment.

5. *The Bundle of Rights Approach*

Beaumont and von Doussa J opened their judgment in the *Miriuwung Gajerrong appeal* by acknowledging that the common law recognises 'native title rights and interests in or in relation to that land'.[22] They referred to the continuum of interests, but concluded that whether proprietary or personal and usufructuary, even native title recognising an entitlement to exclusive possession would remain a personal right and not an interest in land. They found support for this proposition in the decision of Deane and Gaudron JJ in *Mabo*.[23]

Deane and Gaudron JJ clearly stated that one limitation on native title, is that it is in the nature of a personal right, not least because it is inalienable.[24] This characterisation comes from earlier Canadian Privy Council decisions.[25] Recently, however, Lamer CJ of the Canadian Supreme Court explained that such analogies do not deny the proprietary nature of the title or its essential character as an interest in land.[26] Deane and Gaudron JJ, too, acknowledged the limits of this characterisation where native title rights approach full ownership. They admitted that the preferable view was that expressed in *Amodu Tijani* and later Canadian cases such as *Geurin*, 'namely, to recognize the inappropriateness of forcing the native title to conform to traditional common law concepts and to accept it as sui generis or "unique"'.[27]

Deane and Gaudron JJ also understood native title as accommodating more than just interests in land and in particular, not confined to those interests analogous to common law concepts of estates and proprietary interests.[28] Instead, Deane and Gaudron JJ emphasised the role of native title in leaving room for 'the

22 *Miriuwung Gajerrong appeal*, above n1 at 178 (Beaumont & von Doussa JJ).

23 Id at 178–179, referring to *Mabo*, above n3 at 88–89, 101 (Deane & Gaudron JJ).

24 *Mabo*, above n3 at 88–89, 111 (Deane & Gaudron JJ).

25 *Attorney-General (Quebec) v Attorney-General (Canada)* [1921] 1 AC at 408, 411; see also *St. Catherine's Milling Case* (1888) 14 App. Cas. at 54.

26 *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 at ¶113 (Lamer CJ).

27 *Mabo*, above n3 at 89 (Deane & Gaudron JJ), affirming *Amodu Tijani* [1921] 2 AC at 404–405; and *Guerin v R* [1984] 2 SCR 335; (1984) 13 DLR (4th) at 339.

28 *Mabo*, above n3 at 85 (Deane & Gaudron JJ).

continued operation of some local laws and customs among the native people and even the incorporation of some of those laws and customs as part of the common law'.[29] It should be remembered too, that Deane and Gaudron JJ conceived native title as a strong right.[30] By infusing the concept with the character of a personal and usufructuary right, it should not be assumed that the justices were inviting exploitation of the vulnerable aspects of such a characterisation.

The majority also determined that the bundle of rights approach, although not finally decided by the High Court, was supported by the decision in *Fejo*. In that case, the High Court had used similar language to characterise native title, Kirby J identifying 'the bundle of interests we now call native title',[31] and the other judges referring to 'the rights which together constitute native title'.[32] However, the court in this case arguably did not attach the same importance, or implications to their use of this language.

Part of the problem has been that, from the outset, the definition of common law native title, although seeking to reflect the common law, defined native title according to its content rather than its nature. Section 223 of the *Native Title Act 1993* (Cth) defines native title as follows:

> 223 (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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> (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
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> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.
>
> (2) Without limiting subsection (1), rights and interests in that subsection includes hunting, gathering, or fishing rights and interests.

Section 225, which was amended in 1998, requires a determination of native title to contain a determination of 'the nature and extent of the native title rights and interests in relation to the determination area'.[33] To date the courts have not interpreted these provisions as requiring an exhaustive account of the rights and interests that may be exercised pursuant to native title.[34] However, Justice Lee, in the *Miriuwung Gajerrong determination* at first instance, explained that:

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29 Id at 79.

30 Id at 101.

31 *Fejo v Northern Territory* (1998) 195 CLR 96 at 151 (Kirby J).

32 Id at 128 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ).

33 S225(b). The provision as originally enacted required identification of only those rights and interests considered 'important'.

34 See the *Miriuwung Gajerrong appeal*, above n1 at 211 (Beaumont & von Doussa JJ).

> [t]he definition of 'native title' in s 223(1) reflects the elements of native title at common law ... The definition is a compendious provision in that it includes particular rights or interests that at common law are treated as the rights or interests that arise out of, and are dependent upon, native title.[35]

This characterisation was supported by the two majority judges in the *Croker Island appeal.*[36]

But the change in thinking toward a bundle of rights approach is arguably tending toward a greater requirement of proof that may ignore the 'novel legal and administrative problems'.[37] The approach taken by the Commonwealth government in devising the 1998 *Native Title Amendment Act* epitomised this thinking, treating native title as a competing, though less secure, interest with other property interests under Australian law. The bundle of rights approach has also been reflected in the standards of proof required for native title by the processes of the National Native Title Tribunal. It is no longer a matter of establishing that a system of law operated and continues to operate in its modern form, establishing rights and expectations in relation to a definable tract of land. Instead, Indigenous peoples are asked to identify each right claimed and to establish that right through proof of continuity of its exercise according to law.

The characterisation by majority in the *Miriuwung Gajerrong appeal,* of native title as merely a collection of personal rights, changes the nature of the inquiry on native title. It requires that each right or activity sought to be exercised is established through proof of continuity. This raises a number of concerns. First, it assumes that at the time a determination is made all rights likely to be asserted or activities carried out are able to be identified. Second, it suggests that native title is a collection of rights without any underlying or unifying factor that connects those rights and those people to the land. Finally, it invites a pre-conceived idea of the bundle of rights that make up native title. These concerns are illustrated in the decision of Olney J in the *Yorta Yorta case.*[38]

For the Yorta Yorta elders, the native title process brought hope not just for the return of land, although that remains important, but also, for recognition as traditional owners. Recognition includes an acknowledgment of what remains and what was taken away, both of which are part of the Yorta Yorta people's history in the land. It is also important to be able to carry on traditional activities centred around the forests and the river and the sites of cultural significance, such as burial and camping sites. This maintenance of cultural heritage is central to most native title claims.

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35 The *Miriuwung Gajerrong determination*, above n15 at 505 (Lee J).

36 The *Croker Island appeal*, above n1 at 441 (Beaumont & von Doussa JJ).

37 *North Ganalanja Aboriginal Corporation v Queensland* (hereinafter the *Waanyi case*) (1996) 185 CLR 595 at 614–615. Yet it was the majority in the *Miriuwung Gajerrong appeal* that rejected the state's argument for such an interpretation of the *Native Title Act* 1993 (Cth) s225.

38 *The Members of the Yorta Yorta Aboriginal Community v The State of Victoria* (unreported, Federal Court, 18 December 1998).

Olney J, arguably, applied a pre-conceived idea of the bundle of rights that make up native title and asked that each of these be demonstrated through continuity with the past. In the result, Olney J focused on the discontinuities in culture and tradition of the Yorta Yorta and the assertion of native title was rejected, not on the basis of extinguishment, but on the basis that they had abandoned their culture and laws in favour of assimilation. This judgment did not allow the Yorta Yorta people to describe and establish their native title as it was exercised by them.[39] By rejecting the changes in Yorta Yorta law and culture, Olney J denied the underlying connection to the land that remains the foundation of modern expressions of Yorta Yorta native title. In the *Miriuwung Gajerrong appeal*, North J (dissenting) criticised any approach that characterises native title as a collection of distinct and severable rights expressly because it denies that there may be a unifying factor that is fundamental to the exercise of those rights and makes native title susceptible to being frozen in time.[40]

The language of 'a bundle of rights', which was used uncritically by the majority in the *Miriuwung Gajerrong appeal*, narrows the extent to which the content of native title can differ from one assertion of native title to the next. The result, as we see in *Yorta Yorta*, is that if an assertion of native title does not fit the mould of 'the bundle of rights we now know as native title', then there is no native title at all.

6. *An Abstract Bundle: The High Court in Yanner*

The conclusions of the majority in the *Miriuwung Gajerrong appeal* should be contrasted with the views of other judges, including Toohey J in *Mabo* who used the language of a 'bundle of rights', but in the context of the 'relationship of possession'. Toohey J argued that the term 'title' described 'the group of rights which result from possession but which survive its loss; this includes the right to possession'.[41]

Beaumont and von Doussa JJ did agree that:

> to describe native title as a bundle of rights is not to deny the possibility that in a particular case the rights and interests may be so extensive as to be in the nature of a proprietary interest in land ... it is not inaccurate to describe proprietary interests as a 'bundle of rights'.[42]

Surely it is also true that to describe an interest as a bundle of rights in some instances does not deny that the interest may amount to something more than a personal interest and may, in fact, be better described as an interest in land, as suggested by Lee J, because it is an 'aggregate of legal relations' similar to a legal

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39 I wish to acknowledge the Yorta Yorta Elders and thank them and the staff of the Yorta Yorta Nations for allowing me to spend time in their community and for discussing these issues with me.

40 *Miriuwung Gajerrong appeal*, above n1 at 353 (North J).

41 *Mabo*, above n3 at 207 (Toohey J).

42 *Miriuwung Gajerrong appeal*, above n1 at 186–187 (Beaumont & von Doussa JJ).

estate under the common law. It is to this end that North J, in contrast, argued that Lee J's finding that the native title of the Miriuwung Gajerrong peoples was an interest in land that should be respected as a reflection of the traditional law of the people in that case and was a proper construction of native title.[43]

Like many concepts in property law, the term 'title', or ownership or possession or fee simple, even the concept of property itself, do not have certain definitions or contents.[44] They are often described as abstract concepts or, more usefully, as relational concepts, that is by their relationship with other interests. In *Yanner*, the opportunity to discuss the nature of the Crown's proprietary interest in fauna led to a sophisticated discussion of property that has been missing in the native title debate. Gleeson CJ, Gaudron, Kirby and Hayne JJ, discussing the Crown's interest in fauna, warned about employing inappropriate conceptions of property that may lead to 'false thinking':

> as elsewhere in the law, 'property' does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as a power permissibly exercised over the thing ... Usually it is treated as a 'bundle of rights'. But even this may have its limits as an analytical tool or accurate description ...[45]

Gummow J regarded the bundle of rights of a proprietary interest not in terms of defined or itemised rights but more akin to the abstract notion of 'artificially defined jural rights', that captured the imagination of the High Court in *Yanner* and North J in the *Miriuwung Gajerrong appeal*.[46] Beaumont and von Doussa JJ rejected this interpretation of Gummow J in *Yanner*, arguing that the reference to 'artificially defined jural rights' did not refer to an abstract title with pendant rights but that the artificiality arose merely as a consequence of the intersection of two legal systems.[47] This interpretation appears to be inconsistent with the rest of the reasoning of Gummow J.

What is of greatest concern, then, in the reasoning of Beaumont and von Doussa JJ in the *Miriuwung Gajerrong appeal* is not simply the use of the language of a bundle of rights, because, as we see in *Yanner*, that language is often used to describe proprietary interests, even sovereign interests, as an abstract expression. The problematic aspects of the reasoning are, first, that this was seen as a defining characteristic of native title, around which its recognition and protection would be determined; and second, that it was presumed that at the time a determination is made, all the rights and interests that are likely to be asserted against the world should be established by proof of law and custom.[48]

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43 Id at 353.

44 Bernard Rudden, 'The Terminology of Title' (1964) 80 *LQR* at 63, 63.

45 *Yanner v Eaton* (1999) 166 ALR 258 at 264 (Gleeson CJ, Gaudron, Kirby, & Hayne JJ).

46 The court there was referring to Kevin Gray & Susan Gray, 'The Idea of Property in Land' in Susan Bright & John Dewar (eds), *Land law: Themes and Perspectives* (1998).

47 *Miriuwung Gajerrong appeal*, above n1 at 189 (Beaumont & von Doussa JJ).

48 This view was expressed by Kirby J in *Wik*, above n7 where he argued that 'legal title and its incidents should be ascertainable before the rights conferred are actually exercised and indeed whether they are exercised or not' at 238 and 238–242.

In essence, in the clamour to articulate what rights and activities are expected to be carried out on native title land, the majority deny a level of abstraction that we readily accept in other common law tenures. Similarly, Brennan CJ (dissenting) in *Wik*, in rejecting the suspension of native title rights, argued that this would recognise a reversionary interest in the native title holders that would equate native title with an estate in fee simple, which it is not.[49] At the same time, however, to use some analogy or comparison with common law tenures, or even the sovereign rights over property analysed in *Yanner*, to gauge the protection of native title should be useful, provided, as identified by Merkel J in the *Croker Island appeal*, it does not deflect the court from its task of defining native title by reference to traditional laws and customs rather than the common law.[50]

7. *An Interest in the Land and Pendant Rights*

The contrasting view of the Court in the *Miriuwung Gajerrong appeal* was the conception of native title as a fundamental interest in land. This was the view of Lee J at first instance and was supported on appeal by North J, in dissent. Lee J argued that:

> [n]ative title at common law is a communal 'right to land' arising from the significant connection of an indigenous society with land under its customs and culture. It is not a mere bundle of rights. The right of occupation that is native title is an interest in land.[51]

Similarly, North J in the appeal characterised native title as, ordinarily, a communal title and an interest in the land itself, whereby the holders of native title have rights and interests which flow from the right to the land.[52]

In the earlier *Croker Island appeal,* Beaumont and von Doussa JJ had affirmed the view that:

> where an indigenous people (including a clan or group) as a community, are in possession, or are entitled to possession, of land under a proprietary native title, that communal title enures for the benefit of the community as a whole and for the subgroups and individuals within it who have particular rights and interests ...[53]

Yet, in the *Miriuwung Gajerrong appeal*, they argued that because native title is not an institution of the common law, it would be 'a mistake to treat native title as a legal construct which is separate from the rights and interests of Indigenous people'.[54] In this later view, which rejects the idea of communal right in favour of merely a collection of individual rights, the majority rejected the idea of

49 Above n7 at 90 (Brennan J).

50 *Croker Island appeal*, above n1 at 496.

51 *Miriuwung Gajerrong determination*, above n15 at 508 (Lee J).

52 *Miriuwung Gajerrong appeal*, above n1 at 238–239 (North J).

53 *Croker Island appeal*, above n1 at 463 (Beaumont & von Doussa JJ).

54 *Miriuwung Gajerrong appeal*, above n1 at 186 (Beaumont & von Doussa JJ).

'incidents', or collective rights and powers. However, their reasoning seems to be inconsistent with the reasoning of the High Court in *Yanner* in particular, and especially the judgment of Gummow J.[55]

Gummow J, in *Yanner* explained the exercise of rights by individual members of the native title group, as the exercise of the 'privileges' of native title:

> The native title of a community of indigenous Australians is comprised of the collective rights, powers and other interests of that community, which may be exercised by particular sub-groups or individuals in accordance with that community's traditional laws and customs ... Each collective right, power or other interest is an 'incident' of that indigenous community's native title.
>
> ... The exercise of rights or incidents ... is best described as the exercise of privileges of native title ... [B]ut the exercise by individuals of the privilege to hunt may be defined by the idiosyncratic laws and customs of that community.[56]

This is consistent with Brennan J's judgment in *Mabo* where it was suggested that, '[i]ndeed it is not possible to admit traditional usufructuary rights without admitting a traditional proprietary title'.[57] Brennan J explained further:

> The fact that individual members of the community ... enjoy only usufructuary rights that are not proprietary in nature is no impediment to the recognition of a proprietary community title ... That being so there is no impediment to the recognition of individual non-proprietary rights that are derived from the community's laws and customs and are dependent upon the community title.[58]

Therefore, where an individual seeks to enforce or protect native title rights, '[t]hose rights and interests are, so to speak, carved out of the communal native title'.[59] On this view, any notion of a bundle of rights is an abstract concept that explains the rights and interests that arise from title to the land. As discussed, this understanding of proprietary interests is logically consistent with the view of property as a 'relationship with a thing' preferred by the High Court.

As I have argued, the idea that there could be a bundle of rights that flow, as a necessity, from the recognition of native title would not be a problem of itself, but the elements required for determining native title should not be conflated. The inquiry should be first to determine if the group asserts an established system of law that they recognise as the source of rights and obligations over a particular tract of land. If so then prima facie they hold native title.

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55 Note also, Brennan J's use of the term 'incidents' to explain rights derived from native title, in *Mabo*, above n3 at 58.

56 Above n45 at 278–279 (Gummow J). See also *Miriuwung Gajerrong determination*, above n15 at 31 (Lee J).

57 Above n3 at 51 (Brennan J).

58 Ibid.

59 Id at 62.

The inquiry immediately moves to the content of native title to be asserted as against the world. Those rights may be extensive and amount to a kind of title that is greater than freehold title in that it imports elements of administration and self-governance. However, as we have seen, the extent of extinguishment and impairment has become a central part of defining native title. Any acts of the State that the common law recognises as affecting native title must be identified. As a result, native title may also be a limited title, for example, to be acknowledged as the traditional custodians of an area of land or to be consulted in the use and development of parks and protected landscapes, or have input where development may impact upon sites or areas of special significance, or the right to carry on particular cultural traditions that may centre around forests or waterways. The requirements of proof for native title may, and perhaps should, be different in these different circumstances. This is not to say, however, that the proof required for more extensive kinds of title should be quantitatively greater, but it may be different in character. This is perhaps best explained by reference to arguments for the recognition of a possessory title.

8. *Possessory Title*

The concerns over requirements of proof and the apparent movement toward an itemised bundle of rights, has led some to suggest moving further away from the 'system of law' approach, revisiting the argument first raised before the High Court in *Mabo* for a possessory title. The theory is best illustrated in the writings of Kent McNeil, in particular his seminal book, *Common Law Aboriginal Title.*[60] McNeil argued that Indigenous peoples could assert a possessory title to their traditional lands, for which the proof of law and custom is less important. On this theory, possessory title exists as a consequence of the assertion of sovereignty. It is not a pre-existing right, it comes into being with the introduction of the common law. And, as a common law title, its existence and nature is determined by the general principles of the common law.

McNeil revisited these issues in a later article, in 1997, in which he considered the relationship between Aboriginal rights and Aboriginal title in Canada, and in particular the foundation of Aboriginal title in occupation.[61] McNeil argued that proof of law and custom should only be relevant to proof of Aboriginal title in order to determine whether a people had a connection with the specific land prior to contact. The content of that title would then be determined by general principles of occupation rather than being defined by specific traditional uses or activities that can be traced to a pre-contact use or activity.[62] Importantly, McNeil argued, such an approach is consistent with the principles of non-discrimination because, at common law, an interest acquired by possession is not limited to the uses relied upon to establish that possession.[63] This argument is largely consistent with the

60 Kent McNeil, *Common Law Aboriginal Title* (1989).

61 Kent McNeil, 'Aboriginal Title and Aboriginal Rights: What's the Connection?' (1997) 36 *Alberta LR* at 117.

62 Id at 122.

63 Id at 136.

Canadian Supreme Court in the *Delgamuukw* case decided later in that year, which clearly articulated the concept of Aboriginal title in Canadian common law.[64]

As a result, subject to their own customary laws, which may change from time to time, Indigenous peoples 'could make any use of [their land] that met their current needs and aspirations'.[65] Once McNeil rejected the idea that the content of native title is to be defined by the uses made of the land at the time of contact, he argued that neither can Aboriginal title be merely a collection of rights to pursue activities. Rather, as a title rooted in possession, it would entitle the possessor to an interest in the land. In circumstances of acquisition of the radical title by the Crown this would result in 'the greatest interest possible' within the common law system of tenure, which is, of course, a fee simple or freehold title.[66]

In summary, McNeil argued:

> Where an indigenous community was in exclusive occupation, its title would arise from that occupation, and would be much the same as ownership, which must mean that it is equivalent to a fee simple. Traditional laws and customs would apply internally to determine the nature of the rights and interests of members of the community, which may or may not be proprietary, but would *not* operate externally to define or limit the community's title as against the Crown or third parties.[67] [Emphasis added.]

Moreover, McNeil argued that this is what Brennan J meant when he said that native title is given its content by traditional law and custom. This is evident, McNeil suggested, from Brennan J's acceptance of the dynamic nature of the content of native title.[68] It is also consistent with the notion that native title can be 'determined' at a point in time without freezing the content of the title. McNeil's critique highlights the discriminatory nature of the bundle of rights approach, which, in seeking to define the activities that Indigenous peoples will conduct on native title land, discriminates against native title in comparison to ordinary common law title holders.

Noel Pearson has used McNeil's arguments in the 1997 article to argue for a possesory native title under Australian common law.[69] Pearson argued that native title has its foundation in occupation, because it was the fact of presence of Indigenous peoples at the time of annexation that precluded the Crown from acquiring proprietary title and which excites protection. Native title would therefore be a communal title to exclusive possession, the content of which is a right to possession arising from the fact of occupation. Native title would also be

64 Above n26.

65 Above n61 at 137.

66 Id at 136. McNeil at 137, admitted that Aboriginal title would not be the same as a fee simple estate but argues that it is 'equivalent' in the sense that it is perpetual and enduring.

67 Id at 140–141.

68 Id at 141.

69 Presentation to the 'Legal Concept of Native Title' workshop, Cairns, 21–23 July 2000, organised by the Cape York Land Council to discuss the strategic conception of native title.

a uniform concept from the outside, its variability according to law and custom being a separate, internal dimension.

Pearson argued that law and custom, then, is not the primary source of evidence in establishing title and is only relevant in relation to establishing who is entitled to claim native title and the territorial extent of that claim. The internal dimension, would however, be enforceable in the ordinary courts and therefore, law and custom would also be relevant to the rights and interests of the community inter se. Native title in every other sense, though, is an ordinary title established by occupation.

The possessory title concept requires only proof of occupancy in order to establish title, therefore avoiding the extraordinary burden of proving a system of laws. It results in a fee simple title, although a communal title, which is an interest in land within the tenure system and thus potentially providing the security that has been denied native title. As well as relieving the burden of proof, it could be argued that this conception of native title will also strengthen it against extinguishment, because it is not a preexisting title, therefore arguments for its vulnerability cannot be sustained. Nevertheless, such protection could just as arbitrarily be denied to a possessory Aboriginal title as it has been denied to native title.

Such a reassessment of the basis of title appears to address some of the issues that have become a substantial impediment to the utility of common law native title for Indigenous peoples. I am not convinced, however, that this approach supports an argument for rejecting native title in favour of a possessory title, or for rejecting the idea of a system of laws as the centrepiece of the conception of native title. The arguments against such a reassessment are similar to those against the bundle of rights approach. To characterise native title as a particular property right is to limit the scope of the concept to benefit only a few Indigenous peoples in Australia. It would not accommodate Indigenous peoples who can no longer establish a continuous physical connection to lands over which they assert continuing rights. We would then be looking to a different concept to address the claims of Indigenous peoples who cannot assert exclusive or near exclusive possession.

Toohey J was the only judge in *Mabo* to specifically address the possessory title arguments. Like Brennan J, Toohey J identified the origin of native title outside the common law, in the prior occupation of territory before annexation, but recognised by the common law with its specific nature and incidents corresponding to those of the traditional system of law. Toohey J contrasted this with the possessory title of McNeil, which has 'no existence before annexation, arising by reason of the application of the common law, its existence nature and incidents are determined entirely by the principles of common law'. In the result, the McNeil argument provides a fee simple title based on possession. [70]

Toohey J argued that no more favourable consequences would flow from an acceptance of the possessory title.[71] The implication of this reasoning is, of course, that native title in an expansive form would reflect at least the benefits associated

70 *Mabo*, above n3 at 187 (Toohey J).

71 Id at 207, 214.

with a possessory, fee simple title.[72] This interpretation is supported by the nature of determinations to date that have recognised the exclusive possession, occupation, use and enjoyment of native title lands. In part, this reasoning is also the basis upon which Pearson has argued that possessory title is 'an aspect of native title and not a separate concept'.[73] Pearson argued that native title has two aspects:

> Firstly, native title has an aspect in relation to the rest of the world, which is able to be described by the common law ... The common law describes this aspect of native title in terms of possession ... Secondly native title has an aspect in relation to its holders which must be ascertained by reference to Aboriginal law and custom.[74]

It is true that the notion that native title is derived solely by reference to the rights established under Aboriginal law is misconceived.[75] Native title is very much a construct of the common law with the limits of recognition clearly emerging from that legal system. In addition, too much emphasis has been placed on the proof of laws and customs and the delineation of rights that will be exercised under native title when proof of continued occupation should have been sufficient. And, insufficient respect has been given to the interests of Indigenous peoples in the development of the doctrine. However, and I fear I may diverge from Pearson's theory on this point, I do believe that there is still an important role for traditional law and custom as a central element of native title.

9. *Physical Presence and Traditional Custom*

The relationship between occupancy and traditional law and custom in the proof of native title can be reconciled in a way that rejects the bundle of rights approach and an undue emphasis in antiquity in conceiving tradition. The judgments of Toohey and Brennan JJ in *Mabo* and comments in later cases that address the issue of proof have caused some confusion. But, arguably, a reconciliation is implicit in many of the decisions. Specifically, the court in *Mabo*, while emphasising the traditional law and customs as the source of native title, also prioritised continued physical presence as evidence of maintaining a traditional connection. Toohey J argued that '[i]t is presence amounting to occupancy which is the foundation of the title and which attracts protection, and it is that which must be proved to establish title'.[76] Moreover, Toohey J stated that '... there is no separate requirement to prove the kind of society beyond proof that presence on land was part of a functioning system'.[77]

In apparent contrast, Brennan J argued, in relation to the requirement to continued acknowledgment, that traditional law and custom is the foundation of

72 See also, McNeil, above n61 at 142.
73 Pearson, above n2 at 122.
74 Ibid.
75 Id at 123.
76 Above n3 at 188 (Toohey J).
77 Id at 187.

title.[78] Gummow J, in *Wik*, pointed out that this has become a fundamental proposition from *Mabo* and incorporated in the preamble to the *Native Title Act* that:

> the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, *in accordance with their laws and customs, to their traditional lands.*[79]

But as Deane and Gaudron JJ explained, there would be no abandonment where there had been continued occupation, that is, continued occupation is sufficient evidence of the continued acknowledgment of law and custom.[80] North J emphasised this point in criticising the bundle of rights approach of the majority in the *Miriuwung Gajerrong appeal*, that the connection to the land was the unifying factor in relation to the rights that flow from native title.[81]

In *Yanner*, Gummow J identified a relationship between these two aspects of native title, in that:

> [t]he heterogeneous laws and customs of Australia's indigenous peoples, the Aboriginals and Torres Strait Islanders, provide its content. It is the relationship between a community of indigenous people and the land, defined by reference to that community's traditional laws and customs, which is the bridgehead to the common law.[82]

Toohey J more clearly explained that there is a separation between proof of the title on the one hand and the content of the title on the other:

> Proof of existence ... is a threshold question. The content of the interests protected is that which already exists traditionally; the substance of the interests is irrelevant to the threshold question.[83]

This is not necessarily an express separation between physical presence (as proof of title) and law and custom (as the content of the title), but an explanation of the kind of evidence required to establish title. That is, the content of the title need not be defined exhaustively in order to establish title.

The majority in the *Miriuwung Gajerrong appeal* argued that the native title rights and interests protected by the common law are only those that are associated with presence on the land, that is, the common law only operates to protect the 'physical enjoyment of rights and interests'.[84] The view of North J in that case is to be preferred and is consistent with the decision of the High Court in *Mabo*, and

78 Id at 58 (Brennan J).

79 Above n7 at 176 (Gummow J) (emphasis added).

80 Above n3 at 110 (Deane & Gaudron JJ).

81 *Miriuwung Gajerrong appeal*, above n1 at 353 (North J).

82 Above n45 at 278 (Gummow J).

83 Above n3 at 187 (Toohey J); see also Lee J in the *Miriuwung Gajerrong determination*, above n15 at 542.

84 *Miriuwung Gajerrong appeal*, above n1 at 188 (Beaumont & von Doussa JJ).

in *Yanner*, to say that the connection to the land is what binds the rights recognised and protected by the common law.

However, proof of occupancy is not an appropriate level of proof in every instance, particularly where it has been profoundly affected by the rights, interests and usages of others. A continuous occupancy since colonisation may be as difficult to establish for some indigenous peoples as the continuous practice of particular laws and customs.[85]

In proving native title, the majority in the *Miriuwung Gajerrong appeal* agreed that the degree of specificity required in a determination will depend on the nature and extent of the native title rights and interests asserted:

> It would be an impossible task in a case where the native title rights and interests comprise an exclusive right to possess, occupy, use and enjoy land, to specify every kind of use or enjoyment that might flow from the existence of that native title.[86]

Nevertheless,

> [i]n cases where the evidence establishes that the nature and extent of rights and interests in relation to land enjoyed by an indigenous group are less than an exclusive right to possess, occupy, use and enjoy the land, it will be necessary to sufficiently identify them.[87]

Although the majority's conclusions regarding the resulting title may be questionable, these observations can be added to others to indicate that actual presence would be clear evidence of maintenance of connection. Therefore, and this is a point also made by Deane and Gaudron JJ, if occupation is established, then that is likely to provide adequate evidence that law and custom is being maintained.[88]

While presence would be a basis for native title founded on physical occupation, 'the spiritual connection, and the performance of responsibility for the land can be maintained even where physical presence has ceased'.[89] Therefore, physical presence should not be understood as an absolute requirement.[90] Moreover, law and custom may be a basis for establishing a possessory title where a continued connection no longer exists. The joint judgment in *Yanner* explained:

> an important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social

85 This may be the case even if the less stringent approach of Lamer CJ in *Delgamuukw* were to be adopted here, which would not require 'an unbroken chain of occupation': above n26 at ¶153.

86 *Miriuwung Gajerrong appeal*, above n1 at 213 (Beaumont & von Doussa JJ).

87 Ibid.

88 *Mabo*, above n3 at 110 (Deane & Guadron JJ); at 188 (Toohey J), 59 (Brennan J), in discussing loss of connection referred to as physical separation.

89 *Miriuwung Gajerrong appeal*, above n1 at 221 (Beaumont & von Doussa JJ).

90 Id at 221–222.

> connection with the land. Regulating particular aspects of the usufructuary relationship with traditional land does not sever the connection of the Aboriginal peoples concerned with the land ...[91]

But does this accommodate what Brennan CJ, in *Wik*, described as 'a non-accessory right'?[92]

In *Yanner*, the High Court returned to the spiritual aspects of Indigenous peoples' connection to the land that had been part of the judgments of the court in *Mabo*. They incorporated these aspects into the understanding of law and custom. Gummow J argued that:

> [t]he conduct of the appellant is inadequately identified in terms of the statutory definition of 'take' and its components such as 'hunt'. What was involved was the manifestation by the appellant of the beliefs, customs and laws of his community.[93]

In part, this emphasis on cultural activity is likely due to the fact that the court was dealing with a particular incident of native title, in effect dealing with an Aboriginal right, rather than the more comprehensive title underlying it. It is in this instance that the cultural elements of the rights being asserted becomes important to the court's reasoning.

Native title could be reinterpreted from being a broad, inclusive concept in these terms to being part of a wider recognition of continuing Aboriginal rights — as is the case in Canada.[94] Aboriginal title in Canada is understood as a part of a broad array of Aboriginal rights but it is peculiar in the characterisation and the requirements of proof. It does not require proof of the importance of the right to maintain the distinct culture of the Aboriginal people. Occupation is presumed to be central to the maintenance of a distinct culture, therefore proof of occupancy is the central criteria of proof.

Aboriginal title is said to be an 'interest in the land itself' that gives rise to other rights and powers in relation to the land but the particular instances of which need not be proved. Aboriginal title equates to exclusive occupancy and a degree of autonomy and authority in relation to the area and the group. Aboriginal rights, however, need not be associated with land and therefore require different elements of proof. They may include rights to carry on cultural traditions such as ceremonies. They may also include rights associated with land that is not held under Aboriginal title, which may include hunting and fishing rights, for example.

At this point, the Australian common law native title blurs any distinction between Aboriginal rights and Aboriginal title.[95] We would normally understand hunting and fishing rights to be native title rights regardless of any rights to exclusive possession that may also be asserted. Indeed, as Lee J observed in the

91 Above n45 at 270 (Gleeson CJ, Gaudron, Kirby & Hayne JJ).

92 Above n7 at 87 (Brennan CJ).

93 Above n45 at 277 (Gummow J).

94 The authoritative determination of Aboriginal title and the relationship with the broader concept of Aboriginal rights can be found in *Delgamuukw v British Columbia*, above n26.

Miriuwung Gajerrong determination, at first instance, the *Native Title Act*, too, 'is not concerned with whether there may be a broader based conception of aboriginal rights than rights dependent upon aboriginal title to land'.[96]

Perhaps what can be learned from the Canadian common law is the potential emergence of other rights that are not currently being asserted in Australia whether broader self-government rights or narrower cultural rights. Also, where a continuity of a non-exclusive occupation can be shown, then certain rights should flow from that and need not be individually articulated. A demonstration of a system of laws would provide the basis for additional rights of management and administration of the land and may develop into other rights of self-government. This is reflected in the positive determination of native title in *Miriuwung Gajerrong*, at first instance.

If the movement toward a bundle of rights approach can be arrested, it may be unnecessary to follow the Canadian route. The concept of native title in Australian common law can be flexible enough in recognising a continuum of interests to accommodate non-possessory rights. However, if proof of occupation and the foundation of Indigenous law are to be a source of strength in the title then a change in direction may be required in relation to the central issue of the susceptibility of native title to extinguishment.

10. Extinguishment and Inconsistency

The doctrine of extinguishment remains a significant problem in the conceptualisation of native title that goes to the heart of the relationship between the two systems of law. It reflects not so much the content of native title, but the extent to which the common law is prepared to recognise Indigenous rights and laws. The problem with the 'recognition space' idea, and indeed with Brennan J's initial characterisation, is that native title is essentially a creature of the common law. It is not simply the incorporation of Aboriginal law into the common law system. It does not approach Indigenous law as an equal partner in negotiating recognition and producing space in which both laws can operate. Indigenous peoples' rights are recognised by the common law on its terms and that recognition has been limited in significant ways. Moreover, these limitations have become the elements of native title that have been developed and expanded.

The common law doctrine of native title has therefore developed in a way that has decreased rather than increased the capacity of native title to recognise Indigenous peoples' law and rights over lands. Not the least of these limitations is the assertion of virtually unfettered power in the Crown to 'extinguish' native title. The courts have incorporated extinguishment as a central feature of common law native title.[97]

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95 McNeil, above n61 at 143, acknowledged that the kind of title recognised by the orders in the *Mabo* case seems to be 'only one kind of native title ... An indigenous people could nonetheless have a less extensive native title'.

96 Above n15 at 507 (Lee J).

97 See *Croker Island appeal*, above n1 at 441 (Beaumont & von Doussa JJ).

Lee J, whose decision at first instance in the *Miriuwung Gajerrong determination* is often regarded as the most expansive characterisation of native title, defined native title as 'an interest in land', which vests in the community:

> ... a right to possess, occupy, use and enjoy that part of the determination area in respect of which native title exists, in accordance with traditional laws, customs or practices acknowledged and observed by them, as far as is practicable, but subject to the extent that the Crown, by legislation and by acts vesting concurrent rights in third parties in land or water of the determination area, has provided for the regulation, control, curtailment, restriction, suspension or postponement of the exercise of the rights vested in the community ... as incidents of native title.[98]

This statement reflects the development of a doctrine of native title in which extinguishment is central to defining native title. Lee J's characterisation is not necessarily an overly expansive definition but the implications were construed so as to give greater respect to the rights under native title and confine the doctrine of extinguishment.

In the *Mabo* decision, the majority agreed that native title may be lost through a number of circumstances. First, native title will be lost through extinction, that is, when there are no remaining members of the native title group to hold the title. Second, native title may be lost through abandonment, that is, when the people no longer exercise the law or possess a distinct culture that gives native title its source and content.[99] Third, native title can be surrendered to the Crown, although it cannot be alienated in any other way.

Finally, native title can be lost through extinguishment by 'a valid exercise of sovereign power inconsistent with the continued right to enjoy native title'.[100] This, then, can occur either through a legislative act, which demonstrates a clear and plain intention to extinguish native title rights; by a grant of an interest that is wholly or partly inconsistent with the continued enjoyment of native title; or where the Crown 'validly and effectively' appropriates land to itself in a manner or for a purpose inconsistent with native title.[101]

Therefore, Indigenous peoples' rights over lands will not be recognised by the common law through native title in many circumstances where these rights continue to exist, be asserted, and exercised, under Aboriginal law. The idea that Indigenous peoples' rights over their traditional land can be extinguished by an act of the colonial state is clearly an invention of one legal system in asserting its

98 Above n15 at 639 (Lee J).

99 Although, it could be argued in many instances that even in the case of abandonment or extinction there are clear laws of succession in Aboriginal law that would apply to ensure that someone speaks of any particular tract of country: see Peter Sutton, *Native Title and the Descent of Rights* (1998). This second circumstance was used by Olney J as the basis for rejecting the claim of the Yorta Yorta people, for whom, he said, 'the tide of history has undoubtedly washed away any traditional rights': *Yorta Yorta determination*, above n38 at ¶126 (Olney J), referring to *Mabo*, above n3 at 60 (Brennan J).

100 Above n3 at 69 (Brennan J).

101 Ibid; see also at 110–111 (Deane & Gaudron JJ).

dominance over another. It was once described as a 'pragmatic compromise' by the courts to accommodate the recognition of rights in the face of the political reality of colonial power.

This aspect of native title supports Pearson's contention that, while native title may not wholly be a creature of the common law, it is certainly not a creature of Aboriginal law. While recognising the pragmatic compromise that rejects recognition where inconsistent rights have been granted, Pearson explained that extinguishment is only 'extinguishment of recognition'.[102] The fact remains that Aboriginal law continues to allocate entitlements to those same lands.

On this analysis, 'extinguishment' occurs wholly within the common law. If a function of the common law in relation to native title is to recognise and protect, then extinguishment is best understood as a withdrawal of recognition and protection.

This understanding of extinguishment has been accepted by the courts, for example by Olney J in the *Arrernte determination,* where it was explained that:

> [i]n the event that the claimant group establishes the existence of traditional rights and interests in relation to the claimed land, it will then be necessary to consider the extent, if any, to which those rights and interests are recognised by the common law.[103]

In *Wik*, the High Court ordered the inquiry into extinguishment on the basis of a test of inconsistency. By this test, once the rights that make up native title have been established, any existing grant will extinguish native title only to the extent of any inconsistency. In that case, a pastoral lease was held to be capable of co-existing with native title. The rights bestowed on the leaseholder were construed as to not necessarily interfere with the continued enjoyment of native title. Where there was any inconsistency, though, the court confirmed that the leaseholder's rights would prevail and the native title rights would yield to that extent.[104]

It remained unclear from *Wik* whether the impairment of native title in this way was to be characterised as 'extinguishment', so that in the event of actual inconsistency native title would be lost. Or whether, in contrast, native title would be impaired to the extent that particular rights and interests under native title could not be exercised in ways or in areas where they would conflict with the leaseholder's quiet enjoyment of title. The court clearly envisaged the concurrent enjoyment of rights over the same land.

In relation to freehold, however, the test of necessary extinguishment was rejected in favour of a presumption of extinguishment. In *Fejo*, the step of assessing the actual inconsistency in a particular instance, and comparing the native title rights asserted with the rights granted by the interest, was not taken.

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102 Above n2 at 120.

103 Above n15 at 12 (Olney J). This is also consistent with the way in which the proof of native title is explained in the legislation at s223(1)(c).

104 Above n7 at 133 (Toohey J, with the concurrence of Gaudron, Gummow & Kirby JJ).

Instead, it was determined, and this was foreshadowed in *Mabo*, that in law the grant of an exclusive possession tenure in perpetuity, such as freehold, is considered so comprehensive as to preclude any question of co-existing rights or any revival or re-recognition of native title.[105]

In *Yanner*, Gummow J confirmed that, in relation to freehold, at least, the question appears to be settled (at least for the moment). Gummow J explained that evidence of continued assertion or exercise of rights was not relevant:

> Where there has been a grant of a fee simple, the application of this criterion [of inconsistency] is not determined by the existence, as a matter of fact, of an indigenous community's attachment or connection to the land, whether spiritual, cultural, social or economic.[106]

In *Anderson v Wilson*, the Federal Court directly addressed the proper test for inconsistency at the marginal case of exclusive possession.[107] In that case, the majority of the court determined that 'exclusive possession' is not necessarily the appropriate basis for determining inconsistency of tenure with continued native title.[108] Rather, the critical question is not whether, as an abstract proposition, the tenure confers exclusive possession, it is whether the rights conferred were inconsistent with any and all of the rights and interests under native title.[109]

Lee J in the *Miriuwung Gajerrong determination,* argued that extinguishment required rights to be absolutely and permanently inconsistent.[110] From this, the degree of inconsistency between the rights granted to third parties, and the rights exercisable by the common law holders of native title, is relevant first, to the question of whether the Crown has evinced a clear and plain intention to extinguish native title; and second, to the question of the degree to which native title rights have been regulated by control or suspension in the event that native title has not been extinguished and the enforceability or protection of native title rights is in issue.[111]

Lee J did not agree that the granting of inconsistent rights effected a partial extinguishment by the extinguishment of one or more bundles of rights but saw these as instances of 'strict regulation of the rights parasitic upon native title by suspension, suppression curtailment or control ...'[112]

The majority in the *Miriuwung Gajerrong appeal* held that, as inconsistent rights and interests are extinguished, the bundle of rights which is conveniently

105 Above n31 at 126. See *Mabo*, above n3 at 69 (Brennan J), 89, 110 (Deane & Gaudron JJ).

106 Above n45 at 288 (Gummow J).

107 *Anderson v Wilson* [2000] FCA 394 (Black CJ, Sackville & Beaumont JJ).

108 Id at ¶45 (Black CJ & Sackville J).

109 Id at ¶83. Compare the majority in the *Miriuwung Gajerrong appeal*, above n1. By virtue of conferment of exclusive possession, native title is wholly extinguished, at 299 (Beaumont & von Doussa JJ).

110 Above n15 at 508 (Lee J).

111 Id at 510.

112 Id at 508 (Lee J).

described as 'native title' is reduced accordingly, but in doing so, they also rejected the idea of parasitic or dependent rights. [113]

Their Honours relied on Gummow J in *Yanner*, regarding the specific 'right or incident to hunt' as support for their opinion regarding partial extinguishment and the bundle of rights conception of native title.[114]

> The rights and interests of indigenous peoples which together make up native title are aptly described as a 'bundle of rights', it is possible for some only of those rights to be extinguished. Where this happens 'partial extinguishment' occurs.[115]

But their reasoning appears to conflict with that of Gummow J in relation to dependent rights.

In addition, in *Anderson v Wilson*, Black CJ and Sackville J viewed the general concept of extinguishment, including partial extinguishment, consistently with Gummow J in *Wik*, as referring to the extinguishment of incidents.[116] This is an important distinction that underscores the error in characterising native title as a bundle of identified rights that can be permanently extinguished one by one. Instead, native title, like other titles, should be considered an abstract bundle of rights that is restricted by inconsistent grants or public uses. In this sense, it is defined by what has been taken away and by its relationship with other concurrent interests.

To this end, North J was inclined to view extinguishment as permanent and absolute, arising from fundamental inconsistency. Anything short of this merely curtails the exercise of rights under the title, as had been argued by Lee J at first instance. Arguably, there may be little difference in effect, save that it leaves more room for notions of suspension and revival, particularly in respect of temporal inconsistency.[117] Importantly, North J argued for a proportionality between the impact of the law and the effect on native title.[118] That is, in order to give 'full respect to the rights of the native title holders',[119] native title should only be impaired to the extent necessary to ensure that inconsistent rights or interests can be enjoyed without interference from the claims of native title holders.[120]

In contrast to the other aspects of their reasons, the notion of the 'reasonable user' in the majority judgment in the *Miriuwung Gajerrong appeal* is an attractive one. Simply stated, having regard to the interests of the other, co-existing rights to be present on the land for respective purposes should be exercised reasonably.[121] That is, native title, like other titles, is a relational concept. This idea seems to sit well with the arguments of North J regarding proportionality.

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113 Above n1 at 185–186 (Beaumont & von Doussa JJ).

114 Id at 98. They also relied on the 'extent of inconsistency' principles.

115 Id at 189 (Beaumont & von Doussa JJ).

116 Id at 275; *Wik*, above n7 at 131 (Gummow J).

117 *Miriuwung Gajerrong appeal*, above n1 at 328–329 (North J).

118 Id at 329–330.

119 Id at 332.

120 Id at 330–331.

121 Id at 238, 242, 245 (Beaumont & von Doussa JJ).

The doctrine of extinguishment should not serve the purpose of taking opportunities to destroy native title unnecessarily. North J warned that the origin of the notions of extinguishment upon which the courts rely should be kept in mind, in particular, the policy setting in which the notions in United States' common law were developed with the purpose of achieving a compromise that would allow the expansion of the Crown's dominion. We do, or should, operate in a different social setting in which greater respect is afforded to the interests of native title holders.[122] Since the validation of past grants in the *Native Title Act* and the *Native Title Amendment Act*, the need to prioritise the interests of non-native title holders should no longer take primacy as a public policy objective of the common law of native title.

11. Sui Generis*: A Source of Vulnerability or Strength?*

The *sui generis* or unique character of native title has been reaffirmed by the courts. However, rather than affirming the strengths of native title, its uniqueness has been relied upon to attribute weakness to the title. The other aspect of the High Court's current conception of native title which has developed to the detriment of the interests of Indigenous peoples, is the idea that native title is inherently vulnerable and fragile. Its susceptibility to extinguishment is inextricably linked to this idea. The courts have argued that because native title is not a grant from the Crown and because it recognises rights from a pre-existing sovereignty, it does not receive the same protection as a Crown grant. Brennan CJ, in dissent in *Wik,* argued that:

> [t]he strength of native title is that it is enforceable by the ordinary courts. Its weakness is that it is not an estate held from the Crown nor is it protected by the common law as Crown tenures are protected against impairment by subsequent Crown grant.[123]

There is a legal maxim that the Crown cannot derogate from a grant once made. But rather than providing protection to native title holders, this maxim has been used to underscore the doctrine of extinguishment. As a pre-existing right, native title is said not to fall within this rule but, as was clearly established in *Mabo*, the rule protects illegal grants made over native title land.

Kent McNeil has questioned the court's interpretation of the history of this rule and the differential treatment of pre-existing rights.[124] McNeil has argued that this is one part of a much broader constitutional rule of the common law, 'that the Crown in its executive capacity cannot derogate from or interfere with the vested rights of its subjects'.[125] It matters not whether those rights are granted by the Crown or emerge from another source.

Even in *Mabo*, there was significant difference among the majority concerning the vulnerability of native title. Although they argued that native title was a

122 Id at 358 (North J).

123 Above n7 at 84 (Brennan CJ).

124 Ibid.

personal right, Deane and Gaudron JJ, for example, also saw it as a strong right. They said:

> If common law native title conferred no more than entitlement to occupy or use until the Crown or those acting on its behalf told the native titleholders to cease their occupation or use, the term 'title' would be misleading, the 'rights' under it would be essentially illusory.[126]

Rather, they argued that:

> The personal rights of use and occupation conferred by the common law native title are not, however, illusory. They are legal rights which are infringed if they are extinguished.[127]

Toohey J addressed this argument directly. For him, to suggest that the power to extinguish is a result of the inherent quality of the title is to employ inappropriate reference to English notions of estates.[128]

> The conclusion that traditional title is in its nature 'personal' or 'proprietary' will not determine the power of the Crown to extinguish the title unilaterally.[129]

Further, Kirby J in *Wik* argued that once native title had been recognised in *Mabo*, native title was entitled to equal protection under the law:

> Ordinary common law principles for the protection of a proprietary right, found to have survived British settlement, extended to the protection of the Indigenous peoples of Australia, in exactly the same way as the law would protect other Australians.[130]

The High Court in *Mabo* twice agreed that the laws of Australia no longer tolerate discriminatory treatment of Indigenous rights. First, they argued that the common law would not support a doctrine that would arbitrarily refuse to recognise the pre-existing rights of Indigenous peoples over their lands.[131] Second, they argued that the Commonwealth Parliament's introduction of the *Racial Discrimination Act* in

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125 Kent McNeil, 'Native Title and Extinguishment', paper presented to the FAIRA Native Title conference, 11 May 1995 at 37. Moreover, McNeil points out that, as a fundamental rule of the common law, it should have applied in Australia. McNeil notes that even in Britain, many titles protected by this rule have their source in pre-existing land tenure systems, for example, from the Anglo-Saxon period. Adverse possession, too, is a modern example of proprietary rights that would be protected under this rule but are not Crown grants. In relation to customary rights in the colonies, McNeil, at 38–39, draws attention to cases such as *Attorney-General of the Isle of Mann v Mylchreest* (1879) 4 AC 294.

126 *Mabo*, above n3 at 91 (Deane & Gaudron JJ).

127 Id at 110.

128 Id at 194–195 (Toohey J).

129 Id at 195.

130 Above n7 at 251 (Kirby J).

131 Above n3 at 41–42 (Brennan J).

1975 no longer allowed the arbitrary abrogation or appropriation of native title rights without due process and compensation protections that are afforded to other non-indigenous interest holders.[132]

Wedged between these two statements, however, is a plainly discriminatory treatment of Indigenous peoples' rights in relation to extinguishment. Up until the passing of the *Racial Discrimination Act*, the Court held that the Crown, whether in right of the states or the Commonwealth, had virtually unfettered power to abrogate the rights of Indigenous peoples in favour of the non-indigenous population.[133]

McNeil argued that in confirming the power of the Executive to extinguish native title, the High Court implicitly acknowledged that the law relating to extinguishment was racially discriminatory. What the High Court has done is to create rules for extinguishment in the *Mabo case* that destroy the idea of equality before the law because in the result 'native title is not as good as other titles'.[134]

The treatment of native title in this way draws out inconsistencies in the High Court's doctrine of native title. The court recognised the rights of Indigenous peoples that flow from their status as first peoples and from their pre-existing sovereignty. They acknowledged that the rights existed regardless of any recognition by the Crown, upon or following the assertion of sovereignty. At the same time, the doctrine of native title has clearly asserted the supremacy of the rights and interests under the colonial legal system over the rights of Indigenous peoples. The language in judgments such as *Fejo* has been unequivocal, reiterating the 'vulnerability' of native title within the legal system. This vulnerability is a construction of the common law, which does not reflect the strength of the rights under Aboriginal law. Yet, the Courts use the notion that native title has its foundation in Aboriginal law as the source of its vulnerability rather than a source of strength.

It is perhaps necessary for the courts to define the scope of native title's uniqueness, so that it is transparent when that uniqueness is a source of strength and when it is a source of weakness. Native title is unique because it is communal, because it is inalienable (except by surrender to the Crown), because it is susceptible to inconsistent grant, and because the rights, incidents and privileges exercisable under it are regulated by the laws and customs of the community who hold title. It is only the susceptibility to extinguishment (which we have seen to be a contested notion) that should be seen as a source of vulnerability. The other characteristics should be emphasised as traits of incredible strength that come from translating sovereign title into proprietary title.

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132 Id at 53 (Brennan J), 15 (Mason CJ & McHugh J).

133 See McNeil, above n125 at 30, 41–42.

134 Id at 42. In recent criticisms of Australia's treatment of native title in the *Native Title Amendment Act*, the Country Rapporteur for Australia to the Committee on the Elimination of Racial Discrimination highlighted the discriminatory nature of the common law. For a full discussion of the CERD committee's criticisms, see AIATSIS submission to the Parliamentary Joint Committee on Native Title and the Land Fund Inquiry.

12. Competing Sovereignties: the Purpose of Recognition

The High Court, in *Mabo* and since, has acknowledged that native title recognised rights that are inherent rights, which do not depend upon the Crown for recognition. As inherent rights, they exist outside the recognition under the common law and therefore the ability of the Crown to derogate from them should be much more restricted under the common law than the current doctrine allows. However, Deane and Gaudron JJ stated in *Mabo*:

> Obviously, where the preexisting native interest was 'of a kind unknown to English law', its recognition and protection under the law of a newly settled British Colony would require an adjustment either of the interest into a kind known to the common law or a modification of the common law to accommodate the new kind of interest.[135]

Lee J in *Miriuwung Gajerrong*, at first instance, explained that:

> [i]t is the means by which the common law recognises rights enjoyed by indigenous inhabitants of land by reason of their occupation of that land and reconciles the rights of those inhabitants with rights obtained by the Crown upon claiming sovereignty over the land.[136]

Native title is not simply the incorporation of Aboriginal law into the colonial legal system, it is a common law title. The courts have limited and re-defined native title in ways that make it more familiar to the colonial legal system and take it further away from Aboriginal law. While perhaps no longer best described as a recognition 'space', at its foundation, native title remains a recognition concept. It is a common law title that recognises the inherent, pre-existing and continuing rights of Indigenous peoples and it recognises the legitimacy and authority of these societies to determine their relationship with their land, and with each other in relation to that land.

It is well understood that the positioning of native title within a hierarchy of rights and interests was a practical compromise by the courts in light of the lateness of the recognition and the impact on titles and interests granted over Indigenous peoples' land over the last 200 years. It was also a practical demonstration of the power of the state. However, the willingness of the courts to continue to undermine native title by reference to such vulnerability is not warranted by the same public policy considerations, particularly in light of legislative and executive attempts to restrict recognition, protection and the scope of native title.

Despite the compromise to the sovereignty of the Crown and the tendency of the courts to limit and contain it, native title is not just a property right nor merely an interest in the land. It is also a self-government right. It is a right or title in a group to order their own affairs, at least in relation to land. It is a recognition under

135 Above n3 at 87 (Deane & Gaudron JJ).

136 *Miriuwung Gajerrong determination*, above n15 at 498 (Lee J).

the common law of the law-making capacity of the group and it seeks to protect that capacity and make it enforceable. Native title is not the sum of individual rights in law, nor can it normally be held individually. It has a different character. It is the right of a group that can be asserted outwardly. Collective rights of Indigenous peoples emerge from their distinct status, identity and history. Collective rights therefore have a special function that is not based on overcoming discrimination or disadvantage, nor do the rights cease to be important when a group reaches a level of equality or freedom from discrimination. Collective rights are a sphere of authority and autonomy, capable of expression against the world.

How that sphere of authority is to be exercised internally remains a matter particular to the group.[137] How that sphere of authority is to be exercised externally is a matter not just for determination under the common law but to be negotiated between Indigenous peoples and the various levels of non-indigenous government. For as long as Indigenous peoples wish to govern themselves to a degree, whether to determine their relationship with their lands, with each other, or with the state, these collective rights will continue to be asserted.

Native title is a unique interest in land. As such, land will remain a unifying force in native title law given the fundamental importance of land to Indigenous peoples' culture and law. As a recognition of a system of laws, native title has the capacity to adapt and develop to consider claims for self-government or other rights relating to the administration of native title lands. It also retains the capacity to develop as the foundation for recognising rights that are not based on land. This consistency and coherency of doctrine is important, not only to allow the law to develop in this way (and for strategic reasons) but because it demonstrates that the original conception of native title in *Mabo's case*, while not necessarily thought out, was a sound theoretical foundation for the doctrine of native title.

It is likely that in the short-term at least, the courts will limit the recognition of native title to the possessory aspects of Aboriginal peoples' claims. Therefore, in discussing the incidents of native title, much will turn on the 'proprietary type' aspect that is asserted outwardly by the group. This is not sufficient reason to narrow the underlying concept of native title to reflect the current focus. The conceptual foundation of native title must remain broad enough to reflect the underlying rationale for the recognition of Indigenous peoples' rights as well as accommodating specific rights.

Combining proof of occupancy with Indigenous law and custom as the source of native title must be accompanied by a re-examination of the susceptibility of native title to extinguishment. The unique character of native title as a reconciliation of competing sovereignties should not result in the assertion of dominance of one legal system over another to the extent that Indigenous rights are subordinated to all competing rights and interests. To do so would be to unnecessarily perpetuate precisely the discrimination within the common law that the recognition of native title should seek to eliminate.

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137 Where there is no question of impinging on individual rights of members of the group. This is a different issue outside the scope of this paper.