By Vance Hughston SC

NATIVE TITLE CONNECTION
An overview

This article provides a brief overview of native title connection law in Australia.

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The existence of native title in Australia is governed by the provisions of the *Native Title Act* 1993 (Cth) ('NTA'), not by common law.[1] Native title claims are commenced and conducted as legal proceedings in the Federal Court. The Court must, in those proceedings, apply the substantive law that requires the applicants to prove all of the elements necessary to establish the existence of native title within the meaning of the NTA. Subject to s82 of the NTA, the rules of evidence apply.

One important object and purpose to be found in the NTA is the resolution of issues and disputes concerning native title by mediation and agreement. Under s82B, unless the Court otherwise orders, every native title claim is referred for mediation. If at any stage of the proceedings agreement is reached between the parties on the terms of an order which will determine the claim, the Court may make a consent order without holding a hearing.[2]

THE LEGAL REQUIREMENTS

The High Court has said that it is necessary to begin consideration of a claim for a determination of native title by an examination and consideration of the provisions of the NTA.[3]

Under the definition of native title in s223(1), the native title rights and interests must have the following characteristics:

(i) They must be communal, group or individual rights and interests;
(ii) They must be rights and interests 'in relation to' land or waters;
(iii) They must be possessed under the traditional laws acknowledged and the traditional customs observed by the peoples concerned;
(iv) Those people, by their laws and customs, must have a 'connection' with the land or waters;
(v) The rights and interests must be 'recognised' by the common law of Australia.

Each of those requirements is mandatory for a determination of native title.

Because the definition in s223(1) refers to traditional laws acknowledged 'and' (as opposed to 'or') traditional customs observed, there is no need to distinguish between what is a matter of traditional *law* and what is a matter of traditional *custom*.[4] The Full Court in *Northern Territory v Alyawarr* (2005) 145 FCR 442 (*Alyawarr* FFC) has stated (at [75]) that this does not require fine distinctions to be drawn between legal rules and moral obligations. Nevertheless, there must be some kind of 'rules' having a normative content[5] and, importantly, those rules must derive from a body of norms or normative system that existed before sovereignty.[6]

In *Yorta Yorta* HC, the High Court stated that the requirement that the rights and interests be 'possessed' under traditional laws acknowledged, and traditional customs observed, imported a requirement that the relevant normative system of laws and customs must have had a 'continuous existence and vitality since sovereignty'.[7] This requirement has caused considerable difficulty for some native title applicants, particularly in the more settled parts of the country. It imposes a burden of proving continuity of the acknowledgment and observance of the relevant laws and customs under which the native title rights and interests are said to be possessed. If there has at any time been an interruption in the acknowledgment and observance of the relevant traditional laws and customs, native title will have ceased to exist and despite the most sincere attempts at reconstruction, native title cannot be revived.

THE IMPORTANCE OF IDENTIFYING THE INDIGENOUS 'SOCIETY'

In any native title claim, the applicant must prove the identity of the Indigenous 'society' under whose laws and customs the claimed native title rights and interests are possessed. The term 'society' is not one which appears in the NTA. It was used in the joint judgment of Gleeson CJ, Gummow and Hayne JJ in *Yorta Yorta* HC, rather than 'community', to emphasise what their Honours described as the close relationship between the group (under whose laws and customs the native title rights and interests are possessed) and the laws and customs of the group.[8] Their Honours said that it is difficult to separate questions about the relevant society from questions of laws and customs. The two are inter-dependent:

> 'Laws and customs do not exist in a vacuum ... Law and custom arise out of and, in important respects, go to define >>

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a particular society. **In this context, "society" is to be understood as a body of persons united in and by its acknowledgment and observance of a body of law and custom.**'[9] (emphasis added)

In *Alyawarr* FFC, the Full Court said that the ordinary meaning of the term 'society' is 'a body of people forming a community or living under the same government'.[10] The Full Court stressed that 'society' is not a word which appears in the NTA, rather it is a conceptual tool for use in its application.[11] In particular, it does not introduce into the judgments required by the NTA any technical, jurisprudential or social scientific criteria for the classification of groups or aggregations of people as 'societies'.[12] The Full Court said that a determination of native title requires a consideration of whether the persons said to be the native title holders are members of a society or community which has existed from sovereignty to the present time, as a group, united by its acknowledgment of the laws and customs under which the native title rights and interests claimed are said to be possessed.[13] That involves two inquiries. The first is whether such a society exists today. The second is whether it has existed since sovereignty.[14] The society will have continued to exist only if each generation of the society has continued, substantially uninterrupted since sovereignty, to acknowledge and observe their traditional laws and customs.[15]

It is the native title applicants who bear the overall burden of proving the continued existence of their native title rights and interests and, typically, the evidence will include oral evidence from the members of the claimant group as well as expert anthropological, historical, linguistic and archaeological evidence. In many cases, perhaps most, the court will be invited to infer from evidence led at the trial, the content of traditional laws and customs at times earlier than those described in the evidence.[16] Inferences have proved to be important in proving the identity of the relevant pre-sovereignty 'society' and the continuity of that society's laws and customs.[17]

THE PRACTICAL APPLICATION OF THE LEGAL PRINCIPLES

As noted above, the mode of proof of native title admits of various possibilities. This does not detract, however, from the fact that it is the applicants who bear the onus of proving those elements which are necessary to establish the existence of native title. As Lindgren J stated in *Harrington-Smith v Western Australia* (2007) 238 ALR 1 (*Harrington-Smith (No. 9)*) at [717], it is the applicants who bear the onus of proving that they continue to acknowledge and observe pre-sovereignty laws and customs, subject to any permissible adaptations. In this respect, the applicants must prove:

(a) the content of the applicable pre-sovereignty laws and customs, allowing for any proved pre-sovereignty regional variation;
(b) any modern adaptations permissible under those pre-sovereignty laws and customs; and
(c) that the claim group, on a fair overall assessment, continues to acknowledge and observe those pre-sovereignty laws and customs, again allowing for any permissible adaptations.[18]

It may well be that because of historical or other factors, some or all of the requirements listed above are no longer susceptible of proof. Yet the NTA, as explained in *Yorta Yorta* HC, requires that they be proved.[19] The importance that can therefore attach to the inferences that may be drawn from the evidence cannot be understated. Inferences, however, will not always be able to overcome the difficulties thrown up by a lack of direct evidence.

Lindgren J noted in *Harrington-Smith (No. 9)* at [295], that the lack of any, or any substantial, written records evidencing the nature and the content of the laws and customs which were acknowledged and observed soon after sovereignty, does pose a particular difficulty for claim groups and the evidentiary vacuum will work against them. The difficulty is compounded where the laws or customs now said to be acknowledged and observed are laws and customs that have been adapted and changed in response to the impact of European settlement.[20] The situation is likely to be different in remote areas which have not been severely affected by European settlement.[21]

Each native title case will depend on its own facts and the history of the particular native title claim group and their ancestors. This can lead to what appears to be unequal treatment for different claimant groups. Where the land or waters concerned are remote and there are few if any third-party interests, state governments may agree to a consent determination on the basis of comparatively modest evidence. Where the land or waters concerned are in more settled areas, or remote but with significant third-party interests, different considerations can apply.

THE IMPORTANCE OF ABORIGINAL AND TORRES STRAIT ISLANDER EVIDENCE

The courts have often said that it is the evidence of the indigenous claimants which will provide the most compelling evidence to support their native title claim. In *Sampi v Western Australia* [2005] FCA 777 (*Sampi* FC), French J said that the Aboriginal evidence about their traditional laws and customs and their rights and responsibilities with respect to land and waters, 'is of the highest importance. All else is second order evidence.'[22]

Lawyers who are preparing or presenting native title claims should be aware of the critical importance that the courts will

attach to the Indigenous evidence. They should ensure that the Indigenous evidence:

(i) is generally consistent;

(ii) addresses, as far as practicable, the issues which the substantive law requires to be addressed; and

(iii) informs and supports the conclusions contained in any expert anthropological report which the applicants propose to rely upon.

The difficulties that Aboriginal and Torres Strait Islanders face in giving evidence in support of their native title claims are well known. In an effort to alleviate these difficulties, the Federal Court will generally hear the evidence of the Aboriginal or Torres Strait Islander witnesses at places on their traditional country in or proximate to the claim area.[23] Witnesses are generally allowed to sit with a friend or family member when they give their evidence and proceedings are conducted in an informal manner.[24] The Court may allow gender-restricted evidence to be led.[25]

Lawyers acting for applicants should always give consideration to whether they should apply to the Court to lead early or preservation evidence in native title proceedings. Early evidence may need to be called from elderly or infirm witnesses whose evidence may otherwise be lost. Early evidence may also be led if negotiations with the state have reached an impasse.[26] If properly prepared and presented, preservation evidence may provide an impetus for stalled settlement negotiations to re-commence.

THE IMPORTANCE OF ANTHROPOLOGICAL EVIDENCE

Although the evidence of the Aboriginal or Torres Strait Islander witnesses will be the most critical evidence in any native title claim,[27] all native title proceedings will also necessarily involve expert evidence from various disciplines. The mode of proof of continuity in traditional laws and customs and the society to which they relate will always involve the consideration of historical and anthropological evidence, viewed in the light of the direct testimony of the Aboriginal witnesses.[28]

The reason why expert evidence – and, in particular, expert anthropological evidence – is needed, is that in all native title proceedings there are inherent difficulties in proving the content of pre-sovereignty laws and customs and the continuous acknowledgment and observance of those laws and customs, down to the present day. While Aboriginal witnesses may be able to recount the content of laws and customs acknowledged and observed in the past, the collective memory of living people will not extend back to sovereignty.[29] As Sackville J noted in *Jango v Northern Territory* (2006) 152 FCR 150 (*Jango* FC), in the ordinary course, Aboriginal claimants will adduce anthropological evidence to establish the link between current laws and customs and the laws and customs acknowledged and observed by the claimants' predecessors at the time of sovereignty.[30] Depending on the circumstances, anthropological >>

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evidence might also help to fill in other evidentiary gaps in the Aboriginal testimony.[31] Anthropological evidence, if otherwise sound, might also assist the court to understand the extent to which the same laws and customs are shared by people identifying with different tracts of country.[32] In *Jango* FC, for example, it was the expert anthropological evidence which proved both the (continued) existence of the relevant 'society', there the Western Desert cultural bloc, and the claimants' membership of that society.[33]

The importance of anthropological evidence was discussed by Mansfield J in *Alywarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group v Northern Territory* (2004) 207 ALR 539. His Honour observed that anthropological evidence may provide a framework for understanding the primary evidence of Aboriginal witnesses in respect of the acknowledgment and observance of traditional laws, customs and practices. He went on to say that not only may anthropological evidence observe and record matters relevant to informing the court as to the social organisation of an applicant claim group and as to the nature and content of their traditional laws and traditional customs, but by reference to other material, including historical literature and anthropological material, the anthropologists may compare that social organisation with the nature and content of the traditional laws and traditional customs of their ancestors and interpret the similarities or differences. Furthermore, there may be circumstances in which an anthropological expert may give evidence about the meaning and significance of what Aboriginal witnesses say and do, so as to explain or render coherent matters which, on their face, may be incomplete or unclear.[34]

The anthropologist's connection report, whether it is submitted to the state for mediation purposes or it is filed with the court as part of the evidence to be adduced at the hearing of the claim, is an extremely important document. Lawyers acting for applicants must take care to ensure that it is directed towards addressing the legal requirements for proving native title. Proof of native title is a legal, not an anthropological, exercise.

When writing a connection report an anthropologist must identify with precision the factual premises on which the opinions expressed in that report are based and must explain the methodology and the process of reasoning by which the anthropologist reached those opinions.[35] The High Court has said that expert evidence '*is only as helpful as the evidence and assumptions on which it is based*'.[36] That principle applies in native title proceedings.[37] No matter how highly qualified and experienced the author of a connection report may be, the opinions expressed in that report will only be as persuasive as the factual premises (that is, the Aboriginal evidence and the primary and secondary historical sources), on which they are based. ■

Some of this article originated in a much longer and more detailed chapter on the proof of native title that I have written for the 2nd edition of *Australian Native Title Law*, which is to be published later this year by Thomson Reuters.

Notes: **1** *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [32]. **2** NTA s87. **3** *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (*Yorta Yorta* HC) at 440 [32]; *Commonwealth v Yarmirr* (2001) 208 CLR 1 (*Yarmirr* HC) at 35 [7]; *Western Australia v Ward* (2002) 213 CLR 1 (*Ward* HC) at 65 [16]. **4** *Yorta Yorta* HC per Gleeson CJ, Gummow and Hayne JJ at 442-443 [41]-[42]. **5** *Ibid* at 442 [41]; *Alyawarr* FFC at 451 [75]. **6** *Ibid* at 441 [38]. **7** *Yorta Yorta* HC at [47]. **8** *Yorta Yorta* HC fn 94 at 445. **9** *Yorta Yorta* HC per Gleeson CJ, Gummow and Hayne JJ at 445 [49]. **10** *Alyawarr* FFC at [78], quoting from the definition of '*society*' in the *Shorter Oxford Dictionary*. **11** *Ibid* at [78]. **12** *Ibid* at [78]. **13** *Ibid*, at 452 [78]; *Yorta Yorta* HC at 456 [89]; *De Rose (No.1)* FFC at 381 [176]. **14** *Alyawarr* at 452 [78]. **15** *Yorta Yorta* HC at 456 [87] per Gleeson CJ, Gummow and Hayne JJ; *Bodney v Bennell* (2008) 167 FCR 84 at [72]-[77]. **16** *Yorta Yorta* HC at 454 [80] per Gleeson CJ, Gummow and Hayne JJ. **17** See, for example, *Sampi v Western Australia* (2010) 266 ALR 537 at [58]-[64]; *Jango v Northern Territory* (2006) 152 FCR 150 at [504]. **18** See, too, *Yorta Yorta* HC at [80] per Gleeson CJ, Gummow and Hayne JJ. **19** *Yorta Yorta* HC at [80] per Gleeson CJ, Gummow and Hayne JJ; *Harrington-Smith (No.9)* at [736] and see too at [295], [339], [784], [969] and [993]. **20** *Yorta Yorta* HC at [82] per Gleeson CJ, Gummow and Hayne JJ. **21** *Gumana v Northern Territory* (2005) 141 FCR 457 at [196]-[202]. **22** *Sampi* FC at [48] **23** See generally Rules 34.120-126 of the *Federal Court Rules 2011*. **24** See, for example, *Ward v Western Australia* (1998) 159 ALR 583 at 496, 497 (Lee J). **25** The leading case on the circumstances in which gender-restricted evidence will be permitted is *Western Australia v Ward* (1997) 76 FCR 492 (Full Court). **26** See the comments of French J in *Frazer v Western Australia* (2003) 198 ALR 303 at [30]. **27** See, for example, *Sampi* at [48]. **28** *Sampi* FC at [964] (French J). **29** The date of the assertion of sovereignty differs in various parts of Australia. In Western Australia, sovereignty was asserted in 1829, in my state, NSW, the date was 1788. In *Sampi* FC (at [1044]), French J was at pains to state that he respected and accepted the view of the Aboriginal witnesses who said that the Bardi and Jawi are one people united by one law, but he said (at [1046]) that this evidence did not allow him to infer that one society of Bardi and Jawi people occupied the claim area at sovereignty and were united then by a single set of traditional laws and customs. **30** *Jango* FC at [462]. **31** *Ibid*, at [292]-[293]. **32** *Ibid*, at 231-2, [293]. **33** *Ibid*, at 241-8, [343]-[348], 250, [354]. **34** *Alywarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group v Northern Territory* (2004) 207 ALR 539 at [88]. **35** *Federal Court Practice Note CM 7* 'Expert Witnesses in proceedings in the Federal Court of Australia'. **36** *Anikin v Sierra* (2004) 79 ALJR 452 at 457 [28]. **37** *Harrington-Smith v Western Australia (No.7)* 130 FCR 424 at [24]-[25]; *Neowarra v Western Australia (No.1)* (2003) 134 FCR 208 at [27].

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