THE INCREMENTS OF JUSTICE: EXPLORING THE OUTER REACH OF *AKIBA*'S EDGE TOWARDS NATIVE TITLE 'OWNERSHIP'

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The Torres Strait regional sea claim, culminating in the High Court decision of Akiba v Commonwealth, signalled a new respect for the holistic relationships and dominion that underlay First Peoples' custodianship of land and waters. The 'Akiba correction' centred upon a distinction between 'underlying rights' and specific exercises of them – and produced in that case a surviving right to take resources for any purpose (subject to current regulation). The correction emerged from extinguishment disputes, but the significance of this edge towards 'ownership' was soon evident in 'content' cases on the mainland. Yet there are new challenges coming in the wake of Akiba. What of the many native title determinations that have been settled or adjudicated on pre-Akiba thinking? And what does this renaissance in native title law offer to the communities that will fail (or have failed) the rigorous threshold tests of continuity – also crafted with the older mindset?

I INTRODUCTION

The moniker of 'ownership' has for the most part been assiduously avoided in Australian native title law. That term is, of course, an imperfect reflection of the depth and sophistication of Indigenous relationships with land. Yet as we move beyond the 25th anniversary of *Mabo v Queensland [No 2]* ('*Mabo*'),[1] and the first generation of implementation and debate, it has become clear that we have perhaps strayed too far from this notion of 'ownership' – in particular the breadth and resilience of interest that it invokes, and the opportunities for adaptation and development that it can provide.[2] The Australian native title doctrine, at least in its retelling after *Mabo*, has been a doctrine of detail – too often dominated by a very focused and un-reflexive examination and translation of 'traditional laws and customs'. Encouraged in various ways by the terms of the *Native Title Act 1993* (Cth), this exacting approach crystallised

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1 (1992) 175 CLR 1.

2 Notable collections include Benjamin R Smith and Frances Morphy (eds), *The Social Effects of Native Title: Recognition, Translation, Coexistence* (ANU E Press, 2007) (see, eg, the poignant comments of traditional owner David Claudie, '"We're Tired from Talking": The Native Title Process from the Perspective of Kaanju People Living on Homelands, Wenlock and Pascoe Rivers, Cape York Peninsula': at 91–116); Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015). See also Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (Report No 126, April 2015) ('*Connection to Country Report*').

in the 2002 High Court decisions of *Western Australia v Ward* ('*Ward*')[3] and *Members of the Yorta Yorta Aboriginal Community v Victoria* ('*Yorta Yorta*').[4] It has impacted on the doctrine's operation in many ways – including as regards approaches to extinguishment, the make-up of claimant groups, the complexity and cost of determination processes, and particularly (for present purposes) the principles governing the definition and establishment of the interest and the supposedly inherent conditions for its survival.

Much has been written on the constraints of the Australian approach, and the fragility and fragmentation that it has tended to produce. Alongside the celebration of hard-won successes (from claims and agreements), there has been a strengthening chorus of concern over the deeper implications of this methodology. It has tended to ignore past transformation of landscapes and economies,[5] confine and dismantle contemporary land relationships, and negate the social and economic opportunities that native title presented for Australia's First Peoples.[6] It has often been intrusive and divisive, and tended to 'balkanise' groups[7] (pulling them away from regional cooperation). It has differentiated between groups based on an uncertain scale of Western interference, and disadvantaged those most severely affected by historical discrimination and oppression.[8] Moreover, this approach has proven to be torturously complex and seems in various ways to be internally inconsistent – asking for both cultural purity and contemporary politico-legal engagement,[9] and making the loss of 'tradition' both a product and a cause of dispossession.[10] At its worst, it risked an incremental irrelevancy for the whole doctrine – as communities continued to adapt over time. Some of these difficulties were noted early by key observers,[11] and there is now a quite substantial body of relevant commentary (amplified by recent work of the Australian Law Reform Commission).[12]

As to the cause of the constrictions, we have at various times pointed to the terms of the *Native Title Act 1993* (Cth), the stubbornly adversarial nature of court processes, the overzealous anthropological and legal explication of community histories, and the mindsets of state and

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3 (2002) 213 CLR 1.

4 (2002) 214 CLR 422.

5 See, eg, Marcia Langton, 'The Aboriginal Balancing Act' (2013) (115) *Australian Geographic* 39.

6 See Sean Brennan, 'The Significance of the Akiba Torres Strait Regional Sea Claim Case' in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 29, 30.

7 Paul Finn, 'A Judge's Reflections on Native Title' in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 23, 26.

8 See generally, Brennan (n 6) 30; Richard Bartlett, 'An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: *Yorta Yorta*' (2003) 31(1) *University of Western Australia Law Review* 35.

9 It has been noted, in the discussion of the 'internal' challenge of native title success, that '[a]ll of this is likely to involve the reform or even outright replacement of existing governing structures in order to meet future challenges': Sean Brennan et al, 'The Idea of Native Title as a Vehicle for Change and Indigenous Empowerment' in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 2, 3.

10 See, eg, Lisa Strelein, 'The Vagaries of Native Title: Partial Recognition of Aboriginal Law in the Alice Springs Native Title Case' (1999) 4(26) *Indigenous Law Bulletin* 13.

11 For important work through the 1990s to early 2000s (*prior* to the critical cases of *Ward* and *Yorta Yorta*), see works by Noel Pearson, Tony McAvoy, Richard H Bartlett, Hal Wootten, Gary D Myers, Luke McNamara and Scott Grattan, Jeremy Webber, Kent McNeil, and Lisa Strelein.

12 See *Connection to Country Report* (n 2). Other contemporary commentary is discussed throughout this article.

territory governments. It would be difficult to deny that each has played a role. Yet, as will be seen, close examination reveals that in some respects the tightening of approach in Australia was an accident of the pattern and exigencies of litigation. This, together with the accumulation of judicial and academic unease, suggests that the 2013 breakthrough in *Akiba v Commonwealth* ('*Akiba*')[13] (a recognition of subsisting broad resource use rights) was overdue and inevitable, that the history of political inaction on these issues is regrettable, and that we now have a rare opportunity to set the Australian law on a better path.

Akiba reflects a new respect for the holistic nature of First Peoples' relationships with land and waters in Australia, and for the dominion that underlay their original custodianship. This High Court decision (and those that quickly followed)[14] was ultimately primarily focussed on extinguishment – but in that context the Court edged native title (back) towards ideas of 'ownership'. The implications of this for native title 'content' (and the difficult legacy of *Ward*) were readily apparent, and as will be seen much has now been written on this aspect of the decision and how it is playing out in the lower courts. In turn, there has now been some attention to consequences for the means by which rights and interests are established. These more conspicuous implications are reviewed in this article, however there is more to consider in the discussion.

There is a new challenge coming in the wake of *Akiba* – potentially a new colonialistic tragedy in Australian legal history. *Akiba* was an important decision, but its beneficiaries are potentially limited in number. Many Australian native title determinations have been settled or adjudicated on the basis of earlier, more constricted understandings of the law – and, as will be seen, the lag in uptake of the new thinking appears likely to continue for some time. Perhaps most importantly, however, the explicit holdings in *Akiba* do little to help the communities that have failed (or will fail) the rigorous threshold standards of continuity and connection laid down in *Yorta Yorta*. The primary purpose of this article is to look at the *Akiba* line of thinking in a deeper legal and logical context, and help to find a broader reach for these important practical and intellectual advances.

Even with this new momentum and the broader thinking from earlier judicial opposition,[15] the tighter knots in the Australian doctrine will take some untying. Modern law tends to seek the precision that the Australian native title law lays claim to, and the exacting and highly focused approach is entangled in mutually supportive ideas (particularly since *Ward* and *Yorta Yorta*). Moreover, any legal recalibration must happen in the shadow of contemporary resource competition, and a lingering historicised view of Indigenous existence that began with a profound misunderstanding of its sophistication and has since long neglected its practical and economic dimensions.[16]

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13 (2013) 250 CLR 209.

14 *Karpany v Dietman* (2013) 252 CLR 507; *Western Australia v Brown* (2014) 253 CLR 507; *Queensland v Congoo* (2015) 256 CLR 239 (all discussed below).

15 Most prominently (as discussed further below) see the views of Lee J in *Ward v Western Australia* (1998) 159 ALR 483; North J in *Western Australia v Ward* (2000) 99 FCR 316; Kirby J in *Commonwealth v Yarmirr* (2001) 208 CLR 1 ('*Yarmirr*'); Black CJ in *Members of Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244; Kirby J in *Ward* (2002) 213 CLR 1; and Gaudron and Kirby JJ in *Yorta Yorta* (2002) 214 CLR 422.

16 See also Finn, 'A Judge's Reflections on Native Title' (n 7) 27; Lisa Strelein, *Compromised Jurisprudence: Native Title Cases since Mabo* (Aboriginal Studies Press, 2nd ed, 2009) 121–2

The Australian Law Reform Commission has recently invited parliamentary assistance on some of these difficult issues – but unfortunately the political intransigence on these matters is also deep set. Moreover, as Bret Walker SC has noted, statutes such as the *Native Title Act 1993* (Cth) tend to take on a 'pseudo-constitutional' aura and are unlikely to be reactively improved in the same way as other Acts.[17] Yet clearly there is work to be done. It is difficult to avoid the awkward truth that the Australian native title doctrine still carries and wields the 'vestiges of colonising intent'.[18]

II *AKIBA* TO *CONGOO* – NEW THINKING ON EXTINGUISHMENT

The 2013 decision in *Akiba* marked the High Court's return to the native title field after some years of little involvement. The litigation concerned a significant sea claim in the Torres Strait – in the first adjudication of which Finn J had determined (critically) that the proven native title interests included a surviving non-exclusive right to take resources in the areas for any purpose (subject to government regulation).[19] On key issues of extinguishment, the majority of the Full Federal Court (on appeal) concluded that successive fisheries legislation had in fact extinguished any right to take fish and aquatic life for commercial purposes.[20] Yet the High Court upheld the survival of the broad right.[21] Critically, in a marked change from the tenor of earlier jurisprudence,[22] the High Court proceeded from the broad view of the interest taken by Finn J to build a new resilience for native title. The reasoning was essentially that it was wrong to impose a segmentation of the general right (ie, a right to take resources for any purposes) into sub-rights – defined, for example, by purpose[23] – as that could lead to an erroneous

('*Compromised Jurisprudence*'); Richard H Bartlett, 'The Source, Content and Proof of Native Title at Common Law' in Richard H Bartlett (ed), *Resource Development and Aboriginal Land Rights in Australia* (The Centre for Commercial and Resources Law, The University of Western Australia and Murdoch University, 1993) 35, 48–9; Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 3rd ed, 2015) 173–6 [13.21]–[13.23]; Kent McNeil, 'The Relevance of Traditional Law and Customs to the Existence and Content of Native Title at Common Law' in Kent McNeil (ed), *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (Native Law Centre, University of Saskatchewan, 2001) 416, 428–9, 443 ff.

17 Bret Walker, 'The Legal Shortcomings of Native Title' in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 14, 15.

18 Lisa Strelein, 'The Right to Resources and the Right to Trade' in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 44, 44.

19 *Akiba v Queensland [No 3]* (2010) 204 FCR 1, especially 131–7 [511]–[540]. Sea claims were limited to non-exclusive assertions of rights by reason of the earlier High Court decision in *Yarmirr*, where a claim had been rejected to the extent that it asserted exclusive possession – most particularly on the basis that recognition of public rights of navigation and fishing and the international right of innocent passage was necessarily inconsistent with any such exclusive native title: *Yarmirr* (2001) 208 CLR 1, 67–8 [94]–[100] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

20 *Commonwealth v Akiba* (2012) 204 FCR 260, 287–8 [64]–[66], [68], [70], 295–6 [87] (Keane CJ and Dowsett J).

21 *Akiba* (2013) 250 CLR 209, 240–2 [61]–[69] (Hayne, Kiefel and Bell JJ), 226–33 [24]–[39] (French CJ and Crennan J).

22 See especially *Ward* (2002) 213 CLR 1 (discussed in detail below).

23 Finn J himself had conceded that particular purposes of activity might still be severable for extinguishment purposes: *Akiba v Queensland [No 3]* (2010) 204 FCR 1, 211 [847].

conclusion on extinguishment given that particular 'exercises', properly understood as such, can be merely regulated with no extinguishment of the underlying right.[24]

Most immediately, this approach provides native title with a potentially very significant defence against piecemeal extinguishment by parliamentary or executive intrusion. An argument of 'mere regulation' is of course not new in the extinguishment jurisprudence,[25] however the important new dynamic here is the resolute emphasis on a distinction between the 'underlying right' and the potentially many and varied 'exercises' of that right.[26] As Edgeworth has explained in post-*Akiba* commentary, the Court's thinking here offers a more 'vertical' and more robust conceptualisation of native title – over the flatter and more fragile 'bundle of rights' emphasis in *Ward*.[27]

Three succeeding Australian High Court decisions, in part building upon key themes in *Akiba*, reveal the clear ascendancy of 'coexistence' over 'extinguishment'[28] in the contemporary Australian jurisprudence. In the 2013 decision of *Karpany v Dietman* ('*Karpany*'),[29] the scenario from the 1999 decision of *Yanner v Eaton* ('*Yanner*')[30] was replayed in the context of a prosecution for the taking of undersized abalone. A defence was argued based on section 211 of the *Native Title Act 1993* (Cth), which in turn rested upon the existence of relevant unextinguished native title rights. Drawing broadly upon the *Akiba* methodology, ultimately the High Court unanimously held that the state fisheries legislation in question[31] had not extinguished the relevant native title rights and that section 211 applied.[32]

A more difficult set of issues presented themselves in *Western Australia v Brown* ('*Brown*')[33] – which related to a claim in the Pilbara region of Western Australia, and was in a sense a complex sequel to *Wik Peoples v Queensland* ('*Wik*')[34] and *Ward*. This case squarely raised some unresolved questions about the practical operation of coexistence and extinguishment, and, as will be seen, the *Akiba* advances proved timely. The High Court had to consider in

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24 *Akiba* (2013) 250 CLR 209, 241–2 [66]–[67] (Hayne, Kiefel and Bell JJ), 232–3 [39] (French CJ and Crennan J).

25 Notably, in *Yanner v Eaton* (1999) 201 CLR 351 ('*Yanner*'), a High Court majority had held that the vesting of 'property' to fauna in the Crown by conservation legislation (the *Fauna Conservation Act 1974* (Qld)) did not extinguish the native title rights relied upon by the appellant (alongside s 211 of the *Native Title Act 1993* (Cth)) in a defence to an unlawful taking of fauna charge.

26 See especially *Akiba* (2013) 250 CLR 209, 242 [68] (Hayne, Kiefel and Bell JJ), 229 [29] (French CJ and Crennan J). It was conceded that a right may (under a particular set of traditional laws and customs) be properly defined by reference to its exercise for a limited purpose – but it was emphasised that that need not be so and was not so in this case: at 224–5 [21] (French CJ and Crennan J), cf 241–2 [66]–[68] (Hayne, Kiefel and Bell JJ).

27 Brendan Edgeworth, 'Extinguishment of Native Title: Recent High Court Decisions' (2016) 8(22) *Indigenous Law Bulletin* 28, 33.

28 See, eg, Raelene Webb, 'The 2016 Sir Frank Kitto Lecture: Whither Native Title?' (2016) 19(2) *Australian Indigenous Law Review* 114, 123 ('2016 Sir Frank Kitto Lecture'); Brennan (n 6) 42.

29 (2013) 252 CLR 507.

30 (1999) 201 CLR 351.

31 *Fisheries Act 1971* (SA).

32 See especially *Karpany* (2013) 252 CLR 507, 514 [5], 518 [19], 519–20 [22] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

33 (2014) 253 CLR 507.

34 (1996) 187 CLR 1.

Brown questions about extinguishment of native title by the grant of mineral leases.[35] The Federal Court had initially concluded that the claimed rights had been extinguished in the locations of the actual mine, town and associated works (constructed in accordance with the state agreement underlying the leases) – notwithstanding that the mine and town had later closed down.[36] Ultimately the High Court unanimously held that the mineral leases (which were found to be non-exclusive) did not extinguish the claimed native title.[37] The Court focused on the nature of the mineral lease rights at the time of their grant (rather than upon their exercise) – at the time of grant they effectively carried a floating potential inconsistency that did not cause extinguishment of the native title.[38] The mining lessees' rights would take priority during the course of the leases (ie, where things were constructed), but that did not mean extinguishment.[39] The Court again drew from and built on logic that underpinned *Akiba*. This is seen in the high bar set for inconsistency (did the existence of the new rights *necessarily* imply that the claimed native title rights and interests could no longer exist?).[40] It is also particularly evident in the conclusion that interference with the exercise of the native title rights (by an improvement made under the leases) did not prevent the survival of the underlying native title.[41]

The High Court handed down another important decision in 2015 – in *Queensland v Congoo* ('*Congoo*').[42] This case concerned a native title claim to land in the Atherton Tablelands, part of which had been taken and used in World War II (by the Commonwealth) as an artillery and live fire manoeuvre range for training pursuant to orders under national security regulations of the time.[43] The Commonwealth relinquished possession in 1945. The prevailing view in the High Court[44] was that the relevant orders authorised the preclusion, for their duration, of the exercise of the native title rights and interests – but could not support a finding of inconsistency

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35 The context was iron ore deposits at Mount Goldsworthy in Western Australia – developed (with leases granted) under a state agreement approved under the *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA).

36 *Brown v Western Australia [No 2]* (2010) 268 ALR 149, see especially 205 [231] (Bennett J). The Full Federal Court upheld an appeal (with some division in reasoning on the key issues): *Brown v Western Australia* (2012) 208 FCR 505.

37 *Brown* (2014) 253 CLR 507, 522–30 [37]–[64] (French CJ, Hayne, Kiefel, Gageler and Keane JJ). The native title claim did not include a claim to control, which on the clear authority of *Ward* would have been extinguished: at 525 [46].

38 Ibid 522–3 [37] ff.

39 Ibid 528 [59] ff.

40 See especially ibid 527 [55]–[56].

41 Ibid 520 [27], 526 [51], see especially 529–30 [64]. Cf *Akiba* (2013) 250 CLR 209, 241–2 [66]–[67] (Hayne, Kiefel and Bell JJ). See also discussion of the broader importance of these points in Brennan (n 6) 40; Richard Bartlett, 'The Requirement of a Clear and Plain Intention and Its Relationship to Equality and the Inconsistency Test in the Extinguishment of Native Title: *Akiba*, *Brown* and *Congoo*' (2015) 34 *Australian Resources and Energy Law Journal* 109, 126–7 ('The Requirement of a Clear and Plain Intention').

42 (2015) 256 CLR 239.

43 More specifically, pursuant to orders made in the 1940s under reg 54 of the *National Security (General) Regulations 1939* (Cth) (themselves made pursuant to s 5 of the *National Security Act 1939* (Cth)).

44 *Congoo* (2015) 256 CLR 239, 251–67 [1]–[40] (French CJ, Keane and Gageler JJ agreeing at 303 [167]–[169]). The 3:3 split in the High Court was resolved (via s 23(2)(a) of the *Judiciary Act 1903* (Cth)) in favour of the decision below (there was a majority below in favour of the native title holders: *Congoo v Queensland* (2014) 218 FCR 358). Yet the authority is somewhat weakened by the inconsistencies between the reasoning in High Court and the Full Federal Court (below). For further discussion, see Edgeworth (n 27) 31–2.

that would lead to a conclusion of extinguishment.[45] Once again the *Akiba* logic – in particular the distinction between 'rights' and their 'exercise' – is evident in this reasoning. The critical regulation, it was said here, was concerned with actual possession (to be understood in its statutory setting) and did not authorise the conferral upon the Commonwealth of a right of exclusive possession (equivalent to unqualified fee simple rights to exclude all for any reason).[46] Indeed it was noted that the regulations assumed the continuation of underlying rights.[47] It was felt that the contention (by the State) that the Commonwealth had a right of exclusive possession inconsistent with native title 'lifts the statutory conferment of "possession" out of its context, disconnects it from its statutory purpose, and thereby misconceives its legal effect'.[48]

As noted above, the conspicuous importance of these cases[49] for future inquiries into extinguishment in Australia has been carefully explored in commentary.[50] There has been close examination of the Court's renewed attention to the 'clear and plain intention' principle[51] – but also the finer interpretative differences on this and other issues left by the awkward 3:3 split of the High Court in *Congoo*.[52] There has also been attention to the practical mechanics of the 'higher bar' now set for extinguishment – particularly the new space for broader and more resilient definitions of rights (returning from *Ward*'s 'disaggregation' under which partial extinguishment was easy),[53] and the increased space for courts to prefer regulation over

45 *Congoo* (2015) 256 CLR 239, 266–7 [39] (French CJ and Keane J), cf 300 [157], 302–3 [166] (Gageler J).

46 See especially ibid 255–6 [12] (French CJ and Keane J), 301–2 [161] ff (Gageler J).

47 Ibid 256–7 [15], 261 [24] (French CJ and Keane J). Their Honours reasoned that a 'clear and plain intention' in legislation is necessary to effect extinguishment (by legislation or by executive act pursuant to legislation) – and re-emphasised that a law which merely regulates the enjoyment of native title or creates a regime of control consistent with its continued enjoyment does not reveal the necessary intention. On the mechanics of approaching extinguishment by a grant pursuant to statute (a point of past confusion), their Honours suggested that the criterion for the satisfaction of the 'clear and plain intention' standard is 'inconsistency' between the rights granted and the propounded native title – an *objective* inquiry but one that begins with construction of the statute, properly informed by its purpose (here there was a limiting negative purpose of not disturbing subsisting rights and interests): at 264–7 [32]–[39]. See further discussion below as to the 'clear and plain intention' test.

48 Ibid 266 [37] (French CJ and Keane J), cf 301–2 [161] (Gageler J). Note that Hayne, Kiefel and Bell JJ took a different view particularly on the precise relevance of statutory 'intention' or 'purpose', and (critically) the nature and effect of the possession conferred by the regulations and orders in question: see especially at 272 [58], 282 [91] and 292 [131] respectively.

49 See also *Tjungarrayi v Western Australia* (2019) 93 ALJR 556 – focused on a relatively narrow interpretative point (the operation of s 47B in the context of exploration tenements), but broadly consistent with the tenor of the succeeding High Court decisions discussed here.

50 See also *Murray v Western Australia [No 5]* [2016] FCA 752, [1283]–[1297] (McKerracher J) ('*Murray*').

51 Bartlett, 'The Requirement of a Clear and Plain Intention' (n 41). Professor Bartlett argues that (at the very least) greater substance has been given to this notion by consistent adoption of a standard of 'inconsistency' informed by it: at 126–7.

52 See, eg, ibid; MA Stephenson, 'The Doctrine of Extinguishment: And Then There Was *Congoo*' (2016) 6(1) *Property Law Review* 3. For a broader analysis of the statutory interpretation issues at play, see Samantha Hepburn, 'Statutory Interpretation and Native Title Extinguishment: Expanding Constructional Choices' (2015) 38(2) *UNSW Law Journal* 587.

53 Edgeworth (n 27) 28. Cf Brennan (n 6) 38.

extinguishment[54] and make findings of effective 'suspension'.[55] As Sean Brennan notes, these cases at their core reflect a growing reluctance to find 'inconsistency' of the requisite type, and from this point on a high degree of 'friction' can occur without causing extinguishment.[56]

III THE SIGNIFICANCE OF THE *AKIBA* CORRECTION

As implicitly acknowledged soon after by the High Court in *Brown*,[57] the reasoning and outcome of the *Akiba* decision had broader implications – most obviously for the way in which native title rights and interests are to be defined. It also has acknowledged implications for the means by which rights are to be established (as alluded to earlier), and potentially for the viability of future 'regional' claims. Moreover, it is argued here that *Akiba* may hold a further inchoate significance – for communities with *existing* native title determinations and communities left behind by the strictures of the *Yorta Yorta* test for continuity and connection.

The critical pivot for these broader implications is *Akiba*'s strong distinction between a 'right' and its 'exercise' – and an accompanying resistance to undue legal fragmentation of the rights (and connections with land). The underlying problem to be addressed is the Australian law's penchant for detail in the examination and translation of traditional laws and customs, which as noted above has permeated many aspects of its operation. The *Akiba* distinction is potentially a big step on the path around the difficulties. Not least, there is scope here for a far better accommodation and rationalisation of community 'change'. While the courts have long acknowledged the reality and/or legitimacy of change,[58] attempts to find space for it within the stricter Australian methodology have been strained and faltering. These efforts have failed to develop into a principled and consistent flexibility.

Interestingly, there is Canadian precedent for the *Akiba* distinction between 'rights' and their 'exercise' – from the specific 'Aboriginal rights' jurisprudence commencing in the mid-1990s. McLachlin J in the critical case of *R v Van der Peet*,[59] when considering an 'aboriginal rights' defence to a fisheries prosecution, had sought to avoid freezing rights (in part) by distinguishing

54 Stephenson (n 52) 15.

55 Edgeworth (n 27) 30–1; Stephenson (n 52) 21–2. Note in this regard however the apparent resistance of Hayne, Kiefel and Bell JJ in *Congoo* (2015) 256 CLR 239.

56 Brennan (n 6) 41. Cf Stephenson (n 52) 16.

57 *Brown* (2014) 253 CLR 507, 521 [34] (French CJ, Hayne, Kiefel, Gageler, and Keane JJ).

58 See, eg, *Mabo* (1992) 175 CLR 1, 61, 70 (Brennan J), 109–10 (Deane and Gaudron JJ), 192 (Toohey J); *Yarmirr* (2001) 208 CLR 1, 131–3 [295]–[297], 137–8 [309] (Kirby J); *Yorta Yorta* (2002) 214 CLR 422, 439–40 [31] (Gleeson CJ, Gummow and Hayne JJ); *Ward* (2002) 213 CLR 1, 243–5 [569]–[575] (Kirby J). For international examples, see *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 1091 [132], 1103 [154] (Lamer CJ); *R v Van der Peet* [1996] 2 SCR 507, 602 [179] (L'Heureux-Dubé J), 632 [240]–[241] (McLachlin J); *R v Sappier* [2006] 2 SCR 686, 713–15 [46]–[49] (Bastarache J); *In re General Adjudication of all Rights to use Water in Big Horn River System*, 753 P 2d 76, 119 (Thomas J and Hanscum DJ) (Wyo, 1988); *Faulkner v Tauranga District Council* [1996] 1 NZLR 357, 365–6 (Blanchard J); cf *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) arts 3, 4, 21, 23, 26, 31–2.

59 [1996] 2 SCR 507.

between general ancestral rights and their modern exercise.[60] Lamer CJ in delivering the majority judgment in the same case had himself noted that the activities under examination should be considered at a general rather than specific level, and may be the exercise in a 'modern' form of a pre-contact practice, tradition or custom.[61] The need for a broader definition of rights, to accommodate 'the passage of time and changing conditions', was also emphasised in important US cases from the related context of treaty fishing rights (subject to deliberate limitation in the treaty process).[62] The logic of such an approach is compelling from the Australian perspective; a broader, more discerning definition of the underlying right can mitigate its fragility, and the complexity of its establishment, definition and operation in contemporary circumstances.[63]

The distinction between a 'right' and its 'exercise' might prove to be elusive in some contexts, or as acknowledged in *Akiba*, sometimes inapposite.[64] It might also (given the Australian history) be naturally resisted in complex lower court arguments and/or claim negotiations. Moreover, this was a deceptively simple turn in the Australian jurisprudence – against the tide of, at least, the preceding High Court cases. To shore up this reasoning, and indeed to better understand the reach of its implications, it is worthwhile to look back to the critical Australian context: the genesis and drivers of the problem *Akiba* was addressing; the alternatives offered up by earlier dissent; and the coherence and durability of this chosen solution.

A The Origins and Drivers of the Restrictive Australian Thinking

The perennially popular passages of *Mabo* certainly laid out the tools for restrictive thinking – particularly in the persistent emphasis upon the source of native title in 'traditional laws acknowledged' and 'traditional customs observed'.[65] Yet, even putting aside the ambiguity of the key terms here, and the fact that they can be (and were in *Mabo*) used with varying intent and sometimes notable flexibility,[66] the deeper detail of *Mabo* seems not to support a strict approach to either native title definition or proof of continuity and connection. It has been noted

60 Ibid 630–3 [233]–[243], 635–6 [248]–[250] (McLachlin J), cf 590–2 [149]–[154] (L'Heureux-Dubè J) (both in dissent on the outcome).

61 [1996] 2 SCR 507, 551–3 [51]–[54]. See also *Mitchell v Minister of National Revenue* [2001] 1 SCR 911, 926–9 [9]–[15] (McLachlin CJ). Cf *R v Sappier* [2006] 2 SCR 686, 701–2 [23]–[24], 714–15 [48]–[49] (Bastarache J). See also *R v Powley* [2003] 2 SCR 207.

62 See, eg, *United States v Michigan*, 471 F Supp 192, 260; cf 280–1 (Fox CJ) (D Mich, 1979). Cf also *United States v Washington*, 384 F Supp 312, 401–2 (Boldt J) (WD Wash, 1974) and *United States v Washington*, 520 F 2d 676, 683 (Choy J) (9th Cir, 1978).

63 See Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008) 332, 434 n 41. See generally Part II of the book for more discussion including on the complex position in New Zealand. On the difficulties of definition, see also the references to formative Aboriginal rights case law and transnational commentary from authors such as Strelein, Myers, Barsh, Henderson, Morse, Rotman, Borrows, Boast, Ogden and Austin: at 434–5 n 42.

64 (2013) 250 CLR 209, 224–5 [21] (French CJ and Crennan J).

65 See especially *Mabo* (1992) 175 CLR 1, 57–60, 70 (Brennan J).

66 See, eg, *Mabo* (1992) 175 CLR 1, 110 (Deane and Gaudron JJ). See also Graeme Neate, 'Turning Back the Tide? Issues in the Legal Recognition of Continuity and Change in Traditional Law and Customs' (Conference Paper, Native Title Conference 2002: Outcomes and Possibilities, 3 September 2002) 16–22; Bruce Rigsby, 'Custom and Tradition: Innovation and Invention' (2006) 6 *Macquarie Law Journal* 113.

many times in succeeding years,[67] but is worth repeating, that the determination in *Mabo* was broadly phrased: an entitlement 'as against the whole world to possession, occupation, use and enjoyment of the lands'.[68] The implication (at least) of a broad communal 'ownership' was also reflected in the apparent acknowledgment of that possibility in various other parts of the majority judgments.[69] There were differences in those judgements as regards the precise conceptualisation of native title, but the baseline appeared to be that it was a 'title to land' rather than some 'indeterminate' and 'contingent' set of rights.[70] Moreover, as regards proof of continuity and connection, there was little concern about conspicuous community adaptations,[71] some express doubting of any specific continuity of 'lifestyle'-type requirement,[72] and notable flexibility on issues of continuity and connection even in Brennan J's key pronouncements.[73]

Beyond the inflections of the decision itself, the broader context for the *Mabo* case throws some light upon on its emphasis on 'traditional laws and customs'. For example, the previous Australian and Privy Council precedent,[74] and the *Mabo* Court's principal task of extricating itself from that legal history, in various ways prompted attention to the specifics of the Meriam claimants' 'laws and customs'. Most notably, at the core of Brennan J's judgment was a rejection of the 'absence of law' and 'low in the scale of organisation' theories of pre-settlement Australia.[75] Moreover, the somewhat atypical nature of the *Mabo* claim (and its original framing) itself encouraged particularity – ie, a focus on the inter se rights within the Meriam community.[76] With such context in mind the terminological emphasis of *Mabo* is more readily

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67 See, eg, for early examples Kent McNeil, 'Aboriginal Title and Aboriginal Rights: What's the Connection?' (1997) 36(1) *Alberta Law Review* 117, 141–2; Scott Grattan and Luke McNamara, 'The Common Law Construct of Native Title: A "Re-feudalisation" of Australian Land Law' (1999) 8(1) *Griffith Law Review* 50, 70. Cf Noel Pearson, '204 Years of Invisible Title: From the Most Vehement Denial of a People's Rights to Land to a Most Cautious and Belated Recognition' in MA Stephenson and Suri Ratnapala (eds), *Mabo: A Judicial Revolution* (University of Queensland Press, 1993) 75, 82.

68 (1992) 175 CLR 1, 217 (The Court), see also 76 (Brennan J), cf 118–9 (Deane and Gaudron JJ), 216 (Toohey J).

69 See, eg, ibid 51–2, 60–1 (Brennan J), 207, 214 (Toohey J), 88–9, 92–3 (Deane and Gaudron JJ). Implications to the contrary really only appear in comments of Toohey J: at 178–9, 184, 187–8, and the dissenting judge Dawson J: at 129, 132, 160, 169 – both of which were informed by Canadian decisions (see esp 186-9 (Toohey J), 132 (Dawson J)) that have since been corrected on the issue of 'Aboriginal Title' content in Canada.

70 Edgeworth (n 27) 28.

71 See *Mabo* (1992) 175 CLR 1, 60–1, 69 (Brennan J), 192 (Toohey J), 157 (Dawson J).

72 See ibid 192 (Toohey J), 110 (Deane and Gaudron JJ).

73 See ibid 57–61, 69–70 (Brennan J) – particularly the references to 'practicability', the adaptive nature of laws and customs, and survival of the 'general nature' of the connection.

74 For examination of pertinent aspects of the pre-existing precedent (and the relevance of the pre-existing methodologies of statutory land rights and previous work on customary law by the Australian Law Reform Commission): see Young (n 63) ch 8.

75 See, eg, *Mabo* (1992) 175 CLR 1, 33, 37–45, 58 (Brennan J).

76 See, eg, ibid 21–2, 24 (Brennan J), 115–8 (Deane and Gaudron JJ), 156, 174 (Dawson J), 176 (Toohey J). Also, in Brennan J's judgment the focus on traditional laws and customs acted as scaffolding for his (new) rationalisation of the inalienability of native title: at 51–70. For further recent analysis of the 'inalienability' restriction, see David Yarrow, 'The Inalienability of Native Title in Australia: A Conclusion in Search of a Rationale' in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (The Federation Press, 2015) 60; Strelein, 'The Right to Resources and the Right to Trade' (n 18) 50.

understandable, and it is harder to view the decision as a deliberate precedent for the overzealousness to follow.

Popular passages from Brennan J's judgment in *Mabo* were, of course, entrenched in section 223 of the *Native Title Act 1993* (Cth) – complete with ambiguity but clipped of context.[77] The statutory wording (in both sections 223 and 225) certainly ushered along the narrow Australian thinking, albeit perhaps not unavoidably.[78] Yet ultimately section 223 took on a life of its own in perpetuating the restrictiveness, as the High Court strengthened its resolve that the statute must be the key point of reference in these cases.[79] As will be seen, this approach, which Strelein has noted worked to separate negotiation and judicial reasoning 'from the common law history and principles of justice',[80] proved to be very significant in the context of the issues under analysis here.

In the succeeding years, the pursuit of detail was pressed forward by persistently selective quoting of *Mabo* (as endorsed by section 223). Moreover, further encouragement for ongoing emphasis on traditional laws and customs, and some exacting focus in the inquiry, came in various forms. There was further dalliance with the 'absence of law' and/or 'scale of organisation' debates,[81] indicating that a clearer early rebuke would have been beneficial.[82] There was also (for various reasons) some continued blurring of communal and individual rights in these formative years[83] – the latter tending to lean the analysis towards more specific inquiries. The courts also had regular encounters in the cases with the long statutory history of narrow and specific Aboriginal land use concessions.[84] Indeed a number of the formative cases

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77 As noted (for example) in *Northern Territory v Alyawarr* (2005) 145 FCR 442, 468–9 [87] (Wilcox, French and Weinberg JJ).

78 See, eg, *Neowarra v Western Australia* [2003] FCA 1402, especially [368], [382]–[383] (Sundberg J); Hal Wootten, 'Mabo – Issues and Challenges' (1994) 1 *Judicial Review* 303, 338; and generally Young (n 63) ch 10. As to the intended meaning and significance of s 225: see Lisa Strelein, 'Reforming the Requirement of Proof: The Australian Law Reform Commission's Native Title Inquiry' (2014) 8(10) *Indigenous Law Bulletin* 6, 9 ('Reforming the Requirement of Proof').

79 See, eg, *Yarmirr* (2001) 208 CLR 1, 35–40 [7]–[20] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), 110–19 [243]–[265] (Kirby J), 143 [324] (Callinan J); *Ward* (2002) 213 CLR 1, 60 [1]–[2], 62 [4], 64–6 [14]–[16], 208–12 [468] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Yorta Yorta* (2002) 214 CLR 422, 432–3 [9], 439–40 [31]–[32], 451 [70], 453 [75], cf 442 [40], 453 [76] (Gleeson CJ, Gummow and Hayne JJ), cf 463 [112] (Gaudron and Kirby JJ), 489 [177] (Callinan J).

80 Strelein, 'Reforming the Requirement of Proof' (n 78) 6. See, eg, the comments in *Commonwealth v Yarmirr* (1999) 101 FCR 171, 191 (Beaumont and von Doussa JJ); Noel Pearson, *Up from the Mission: Selected Writings* (Black Ink Books, 2009) 75–95 ('*Up from the Mission*').

81 See *Western Australia v Commonwealth* (1995) 183 CLR 373, 431–2 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) ('*Native Title Act Case*'); *Wik* (1996) 187 CLR 1, 182 (Gummow J), 236 (Kirby J).

82 As to the redundancy of the 'scale' methodology, see Kent McNeil, *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (Native Law Centre, University of Saskatchewan, 2001) 460–1.

83 See, eg, *Fejo v Northern Territory* (1998) 195 CLR 96, 115 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) ('*Fejo*'); *Yanner* (1999) 201 CLR 351, 381–4 [67]–[75] (Gummow J). Cf *Ward* (2002) 213 CLR 1, 287 [665] (Callinan J). See also *Mason v Tritton* (1994) 34 NSWLR 572, 583 (Kirby P); *Dillon v Davies* (1998) 8 Tas R 229, 235, 239–41 (Underwood J).

84 See, eg, *Mabo* (1992) 175 CLR 1, 141–2 (Dawson J); *Native Title Act Case* (1995) 183 CLR 373, 430–1 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Wik* (1996) 187 CLR 1, 119–20 (Toohey J), 141 (Gaudron J), 217, 227, cf 246 (Kirby J); *Fejo* (1998) 195 CLR 96, 144 [88]–[89] (Kirby J) (discussing 1836 Letters Patent); *Yanner* (1999) 201 CLR 351, 355 (GJ Gibson QC) (during argument), 363 (Gleeson CJ, Gaudron, Kirby and Hayne JJ), 408 (Callinan J); *De Rose v South*

(including *Yanner* in the High Court) concerned what might be termed 'specific rights'-type native title claims (in defences to particular prosecutions etc).[85] Such claims draw attention to more specific historical law, custom and practice for the definition of the right,[86] and logically tended to produce similar particularity on questions of proof.[87] Moreover, it should also be noted that the northern focus of early High Court appeals meant there was little opportunity for the Court to consider the many communities that might struggle with highly detailed inquiries.[88]

Most importantly, however, the extinguishment focus in the early formative appeals[89] encouraged an emphasis on detail in various ways. The northerly claimants could, and did, emphasise the survival *in fact* of their laws, customs and lifestyle (often in some detail)[90] as an aspect of their resistance to findings of *legal* extinguishment.[91] And in some instances, faced with the prospect at that point of wholesale extinguishment, they understandably pressed some particularisation of the native title interest to highlight the possibility of some survival[92] (or at least avoid too early a finding of extinguishment).[93] For the High Court, rationalising past extinguishment was its first big dilemma after *Mabo* – and it chose to avoid indiscriminate blanket extinguishment via notions of coexistence and 'partial extinguishment'.[94] The latter

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Australia (2003) 133 FCR 325, 332–4 [14]–[25], 336–7 [34] (Wilcox, Sackville, and Merkel JJ) ('*De Rose*'); *Derschaw v Sutton* (1996) 17 WAR 419, 433 (Wallwork J), 445 (Murray J); *Wilkes v Johnsen* (1999) 21 WAR 269, 274 (White J), 288, 293 (Wheeler J). See also the analysis in Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report No 31, June 1986) ch 35.

85 This terminology borrows from the Canadian case law – see especially *R v Van der Peet* [1996] 2 SCR 507 (discussed above).

86 See, eg, *Yanner* (1999) 201 CLR 351, 361–2 [4]–[5] (Gleeson CJ, Gaudron, Kirby and Hayne JJ), 381–4 [64]–[75] (Gummow J), 402–4 [132]–[134] (Callinan J) (and note the reference to the early specific rights case of *Walden v Hensler* (1987) 163 CLR 561); *Mason v Tritton* (1994) 34 NSWLR 572, 574–5 (Gleeson CJ), 584–5, 594–5 (Kirby P), 598, 601 (Priestley JA). Cf *Derschaw v Sutton* (1996) 17 WAR 419, 425–7 (Franklyn J), 445 (Murray J); *Dillon v Davies* (1998) 8 Tas R 229, 234–5, 238–9 (Underwood J).

87 See, eg, *Mason v Tritton* (1994) 34 NSWLR 572, 583–4 (Kirby P), 598, 601, 604 (Priestley JA). Cf *Derschaw v Sutton* (1996) 17 WAR 419, 425–7 (Franklyn J); *Dillon v Davies* (1998) 8 Tas R 229, 234–5, 238–9 (Underwood J).

88 See, eg, *Mason v Tritton* (1994) 34 NSWLR 572, 604 (Priestley JA).

89 See especially *Wik* (1996) 187 CLR 1, and *Fejo* (1998) 195 CLR 96.

90 See *Wik* (1996) 187 CLR 1, 4, 12 (during argument), 232 (Kirby J), cf 102 (Toohey J). See also *Fejo* (1998) 195 CLR 96, 98, 101–2 (AR Castan QC) (during argument).

91 See *Wik* (1996) 187 CLR 1, 9, 11–13 (W Sofronoff QC) (during argument), 24 (SL Doyle SC) (during argument), 27–8 (JL Sher QC) (during argument), 60 (W Sofronoff QC) (in reply); *Fejo* (1998) 195 CLR 96, 98 (J Basten QC) (during argument), 100–1 (AR Castan QC) (during argument), cf 113–14 (G Griffith QC) (during argument). Cf *Yanner* (1999) 201 CLR 351, 358–9 (J Basten QC) (during argument). See also Noel Pearson, 'The Concept of Native Title at Common Law' in Galarrwuy Yunupingu (ed), *Our Land is Our Life: Lands Rights – Past, Present and Future* (University of Queensland Press, 1997) 150, 154 ff.

92 See, eg, *Wik* (1996) 187 CLR 1, 17 (Sir M Byers QC) (during argument) comparing native title rights to profits à prendre; *Fejo* (1998) 195 CLR 96, 97–8 (J Basten QC) (during argument), 100–2 (AR Castan QC) (during argument), 108 (HC Burmester) (during argument), 152 (Kirby J).

93 See, eg, *Wik* (1996) 187 CLR 1, 21 (SL Doyle SC) (during argument) emphasising that the nature and content of native title are determined by 'particular facts', cf 213 (Kirby J). See also *Fejo* (1998) 195 CLR 96, 102–3 (RH Bartlett) (during argument) (particularly the emphasis for these purposes on the variability of native title).

94 See generally *Wik* (1996) 187 CLR 1.

was, in the eyes of many, the major driver of the emerging conceptual fragmentation of native title. This played out immediately, even in process, as the High Court in *Wik* emphasised the factual particularity of native title to underscore its position that extinguishment could not be properly addressed in advance of a determination of native title below.[95]

While the 'survival in fact' argument did not fare well,[96] the argument for possible coexistence had to an extent been won (for better or worse via the concept of partial extinguishment). So for the claimants in *Yanner*, *Commonwealth v Yarmirr* ('*Yarmirr*'),[97] and *Ward* there was now more scope to argue broader conceptualisations of their interests – to resist *too ready* a finding of extinguishment or partial extinguishment, to press for a more comprehensive and possibly exclusive interest in competitive offshore areas, and/or to advance arguments to some mineral entitlement. Yet by the time of this shift in the legal landscape, 'traditional laws and customs' (with persistent overtones of specificity) had been woven deeply into the jurisprudence. In particular, the concept of partial extinguishment had by the time of *Fejo v Northern Territory* ('*Fejo*') brought clearly into play a potentially restrictive 'bundle of rights' thinking on content.[98] And needless to say even when the claimants could press a more holistic view of their interests, ample encouragement for the strict thinking was still found in the arguments of government counsel – who were now pressing hard for piecemeal extinguishment and resisting commercially significant claims.[99] The sophistry of the path that the law laid out for native title claimants in these formative years is regrettable.

Driven haphazardly by these various features of the context, the restrictive thinking on native title content and proof did incrementally strengthen. As regards the content (or definition), the inclination to detail built particularly through the tenor and terminology of the key extinguishment cases – for example the emphasis upon the 'usufructuary', 'sui generis' and 'bundle of rights' characterisations of the interest, its variability, and its 'difference' to common law interests. Occasionally there were (ostensibly) clearer restrictive comments,[100] and more practically, detailed native title determinations were emerging from the lower courts. On the subject of proof of continuity/connection, again the momentum built through the tone of discussion (eg, persistent uncalibrated emphasis on the need for survival of 'traditional laws

95 See especially *Wik* (1996) 187 CLR 1, 122, 131, 133 (Toohey J), cf 213, 243, 249, 251 (Kirby J), cf also 126–7 (Toohey J), 169, 171 (Gummow J).

96 *Fejo* (1998) 195 CLR 96. However, such arguments gained some traction with certain judges for certain purposes – see, eg, *Wik* (1996) 187 CLR 1, 233, 248, 250 (Kirby J).

97 (2001) 208 CLR 1.

98 (1998) 195 CLR 96. See also Lisa Strelein, 'Conceptualising Native Title' (2001) 23(1) *Sydney Law Review* 95.

99 See, eg, *Yanner* (1999) 201 CLR 351, 357 (RJ Meadows QC) (during argument). See also *Ward* (2002) 213 CLR 1 (discussed below); *Native Title Act 1993* (Cth) s 62(2).

100 See, eg, *Wik* (1996) 187 CLR 1, 126 (Toohey J); *Yanner* (1999) 201 CLR 351, 384 [75] (Gummow J). See also *Yarmirr v Northern Territory* (1998) 82 FCR 533, 576–7 (Olney J); *Commonwealth v Yarmirr* (1999) 101 FCR 171, 226 [223] (Beaumont and von Doussa JJ).

and customs')[101], occasional comments that were arguably more explicit,[102] and some notably strict *applications* of the principles in lower courts.[103]

B Crystallisation in *Ward* and *Yorta Yorta*

Whether carried by momentum or context (once again), or driven by interpretative preferences at the time or conscious legal choice, the High Court embraced the accidents of the Australian legal history in the 2002 decisions of *Ward* and *Yorta Yorta*. The Court rationalised, and further entrenched, the restrictive and highly focussed Australian approach to content and proof of continuity/connection. While these cases have already been much discussed, the essential reasoning is important in the context of this article.

In *Ward*, the history explored above clearly weighed on the High Court's treatment of a significant claim in the East Kimberley (on questions of content and extinguishment). The majority's commitment to specificity in definition was in part directed to easing partial extinguishment (and accommodating loss of rights of control).[104] Yet this reflected some neglect of the strong argument in this case for a more holistic conceptualisation of the native title interest – a conceptualisation that could itself provide resilience to the interest (and in fact warrant a new look at the whole concept of partial extinguishment).[105] In any event, the shoring up of the strict approach to content came in various forms: a downplaying of the markers of control that might encourage a broader translation (eg, rights to be asked for permission and to 'speak for country');[106] a downplaying of earlier broad translations (ie, 'the right to possess, occupy, use and enjoy land to the exclusion of others');[107] an emphasis on the specific phrase 'rights and interests' in section 223 (and a correlative disregard of duties and obligations);[108] and a renewed emphasis upon the 'difference' of native title from general common law interests.[109] From within this frame of reference, their Honours were critical of dalliances with

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101 See especially *Fejo* (1998) 195 CLR 96, 128 [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

102 *Native Title Act Case* (1995) 183 CLR 373, 452 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) (later quoted by Brennan CJ in *Wik* (1996) 187 CLR 1, 92). See also *Yarmirr* (2001) 208 CLR 1, 46–52 [37]–[50] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

103 *Members of the Yorta Yorta Aboriginal Community v Victoria* (1999) 4(1) AILR 91; *De Rose v South Australia* [2002] FCA 1342.

104 See, eg, *Ward* (2002) 213 CLR 1, 89 [76], 91 [82], 93–4 [91], 95 [95] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), cf 243 [570] (Kirby J), 262 [615] (Callinan J).

105 Ultimately the High Court confirmed the concept of 'partial extinguishment', particularly by reference to the terms of the *Native Title Act 1993* (Cth): ibid 89 [76], 208–12 [468] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), cf 262 [615] (Callinan J). Contrast the views of Lee J and North J in the lower courts.

106 Ibid 64–5 [14], 93 [90] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), cf 344–5 [821] (Callinan J).

107 See especially ibid 93 [89], 95 [94] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

108 See especially ibid 64–5 [14] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See in this regard Finn, 'A Judge's Reflections on Native Title' (n 7) 27.

109 See especially *Ward* (2002) 213 CLR 1, 64–5 [14], 91–2 [83]–[84], 93 [89]–[90], 95 [95] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

notions of 'ownership'[110] and the lack of specificity[111] in the lower courts – and unsurprisingly dismissed the possibility of mineral entitlements by reason (in part) of the lack of specific traditional law, custom or use relating to the minerals.[112]

Recent commentary has continued to critique the 'disaggregation' of native title that was (nearly) perfected by *Ward*,[113] and particularly the determined characterisation there of the interest as a bundle of rights – 'as an imperative rather than as metaphor'.[114] As a former president of the National Native Title Tribunal (Raelene Webb QC) has noted, this approach appeared to neglect the underlying holistic relationship with land that unifies and orders the specifically identifiable rights.[115] Former Justice Finn, writing extra-judicially after the *Akiba* litigation, has similarly lamented the dilution of the proprietary conception of native title,[116] and emphasised that the reference to 'rights and interests in relation to land or waters' in the *Native Title Act 1993* (Cth) definition fails to capture the whole web of social rights and obligations in play.[117] The Australian Law Reform Commission has recommended (post-*Akiba*) at least a reworking of section 223 to confirm that native title may comprise more broadly-framed rights and possibly include a right to trade.[118] However, there has been no statutory movement on these issues.

The accompanying High Court decision in *Yorta Yorta* focused on questions of continuity and connection, confirming the threshold rejection of a significant southern claim on the basis of cessation in acknowledgment and observance of traditional laws and customs. Gleeson CJ, Gummow and Hayne JJ focused particularly on the 'intersection' of the traditional and common law systems at the point of acquisition of sovereignty,[119] and emphasised that the former could not thereafter validly create rights, duties or interests (hence only those with origins in pre-sovereignty law and custom could be recognised).[120] More tellingly, as regards proof of continuity and connection, their Honours went on to emphasise (with reference to section 223) that the 'normative system' (ie, traditional laws and customs) supporting the rights and interests must have had a 'continuous existence and vitality' since the point of sovereignty

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110 See ibid 91–2 [82]–[84] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), cf 267–8 [627] (Callinan J).

111 See ibid 92 [86], 94–5 [93] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), see also 131 [195], 165–6 [308]–[309], 176 [341], 198 [425], 204 [448] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

112 See ibid 185 [382], 186 [385], 207 [461], 208–12 [468] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), cf 272 [637] ff (Callinan J).

113 See, eg, Edgeworth (n 27) 28.

114 Strelein, 'Reforming the Requirement of Proof' (n 78) 9.

115 Raelene Webb, 'The Next Wicked Problem in Native Title: Managing Rights to Realise Their Potential' (2016) 18 *Southern Cross University Law Review* 93, 101.

116 Paul Finn, '*Mabo* into the Future' (2012) 8(2) *Indigenous Law Bulletin* 5.

117 Finn, 'A Judge's Reflections on Native Title' (n 7) 27.

118 *Connection to Country Report* (n 2) recommendation 8-1.

119 *Yorta Yorta* (2002) 214 CLR 422, 439–40 [31], drawing on arguments and concepts particularly from *Fejo* (1998) 195 CLR 96, 128 [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). And note, with respect to *Fejo*, Walker (n 17) 17–18. See also *Yarmirr* (2001) 208 CLR 1.

120 *Yorta Yorta* (2002) 214 CLR 422, 441–4 [37]–[44] (Gleeson CJ, Gummow and Hayne JJ). Their Honours considered that s 223(1) should be construed in this light and that the term 'traditional' not only refers to generational transmission but also conveys an age of the 'traditions' – only pre-sovereignty normative rules are 'traditional': at 444 [46]. See also *Yorta Yorta* (2002) 214 CLR 422, 454 [79], 456 [86] (Gleeson CJ, Gummow and Hayne JJ), 493 [191] (Callinan J).

for the rights and interests to subsist.[121] They considered, correlatively, that the original 'society' must have had a continuous survival.[122] In various ways the court's rationalisation (particularly when read with *Ward*) tended to shore up the particularity in the Australian continuity and connection inquiries. Through the emphasis on survival of 'system' and original 'society', and the Court's apparent interpretation of those concepts, the doorway was narrowing for many claimant communities.

The reasoning in *Yorta Yorta* has proven particularly controversial – including by reason that it appears to both nullify and require the continued 'vitality' of the Aboriginal 'system', and adopt a quite constrained view of the newly interposed notion of 'society'.[123] Certainly this approach appeared to offer little room for principled accommodation, at the threshold, of the change and interruption found in many claimant group histories. It was suggested that 'some' change and adaptation in traditional law and custom or 'some' interruption in the enjoyment or exercise of rights and interests will 'not necessarily be fatal', yet the guidance offered seemed to just restate the question in the case of 'change' ('what is 'traditional?') and add little in the case of interruption (has acknowledgement and observance continued 'substantially uninterrupted'?).[124] Former Chief Justice French, writing extra-judicially, prominently suggested a 'reversal of onus' – ie, that once certain basic facts had been established (including a reasonable belief of traditional connection) native title was presumed to exist subject to contrary proof.[125] Other commentators have suggested the removal or clarification of the word 'traditional' in the statute.[126] The Australian Law Reform Commission itself recommended statutory reform, namely to include acknowledgment of the adaptive nature of traditional laws and customs and mitigate the various forms of continuity test drawn from *Yorta Yorta*.[127] In the absence of legislative response, recent commentary has continued to emphasise that the Australian approach has produced 'torturous and costly' inquiry into authenticity and continuity – often exacerbated by state government guidelines.[128]

The significant challenges left by *Yorta Yorta*, particularly for communities in the earlier settled and most impacted parts of Australia, in part prompted a rare exception to the history of

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121 Ibid 444–7 [47]–[55], 456 [87] (Gleeson CJ, Gummow and Hayne JJ).

122 See ibid 445–7 [49]–[55], 456–7 [87]–[89] (Gleeson CJ, Gummow and Hayne JJ).

123 For an overview of the early discussion and criticism, see Young (n 63) 324 ff (and the commentary discussed there).

124 *Yorta Yorta* (2002) 214 CLR 422, 454–7 [78]–[89] (Gleeson CJ, Gummow and Hayne JJ).

125 See Justice Robert French, 'Lifting the Burden of Native Title: Some Modest Proposals For Improvement' (Speech, Federal Court Native Title User Group, 9 July 2008). Note that such a proposal was pursued in subsequent federal bills – although some commentators have rightly expressed concern that this idea relies somewhat on State behaviour rather than effecting any change to the requirements of proof themselves: see, eg, Strelein, 'Reforming the Requirement of Proof'(n 78) 7 (she notes that it may be strengthened by preventing a State from relying on its own wrongful acts to disprove continuity – referring to Justice AM North and Tim Goodwin, 'Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform, (Conference Paper, Annual Native Title Conference, 4 June 2009)).

126 See, eg, Pearson, *Up from the Mission* (n 80) 114, 124–5. For comment on such proposals, see Strelein, 'Reforming the Requirement of Proof (n 78) 8.

127 *Connection to Country Report* (n 2), recommendations 5-1–5-4. See also the proposals for guidance on the drawing of inferences in the proof of native title rights and interests (recommendation 7-1).

128 See, eg, Strelein, 'Reforming the Requirement of Proof' (n 78) 7–9. See also Finn, 'A Judge's Reflections on Native Title' (n 7) 26–7; Paul Finn, '*Mabo* into the Future' (2012) 8(2) *Indigenous Law Bulletin* 5, 6.

political inaction on these issues. The high threshold set by the Court, and the slow and costly claims progress in Victoria, led to the passage of the *Traditional Owner Settlement Act 2010* (Vic).[129] This scheme deliberately eases continuity and connection requirements by turning more focus to contemporary connections.[130] There are lingering concerns with some aspects of the process (and substance)[131] of the scheme, but it is offering a more supported, comprehensive and efficient path for communities.[132] Importantly for present purposes, as Strelein has noted, the Victorian scheme reminds us that when the general formal processes are unable to properly engage with land justice claims, they do not simply go away.[133]

IV *AKIBA*'S PROSPECTIVE IMPLICATIONS FOR CONTENT

The recognition of commercial resource rights in *Akiba* was highly significant in the context of this Australian history; not surprisingly there had been early defeats on such claims and subsequent avoidance of the issue in applications and determinations.[134] This aspect of the case (and its take up in lower courts) has received considerable attention in the recent commentary.[135] Hewitt had traced the relevant history in an article written prior to the *Akiba* appeals, noting the array of obstacles faced in claims to commercial rights.[136] These included (in addition to the possibility of past regulatory extinguishment) an initial resistance even to the idea that a 'right to trade' could be a 'right or interest in respect of land or waters';[137] a view held (for a time) that an entitlement to exclusivity would be required before commercial rights could be recognised;[138] and at the very least a likely insistence on specific evidence of

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129 Bryan Keon-Cohen, 'From Euphoria to Extinguishment to Co-existence?' (2017) 23 *James Cook University Law Review* 9, 20–1.

130 See generally ibid 21.

131 See, eg, Katie O'Bryan, 'More Aqua Nullius? The *Traditional Owner Settlement Act 2010* (Vic) and the Neglect of Indigenous Rights to Manage Inland Water Resources' (2016) 40 *Melbourne University Law Review* 547.

132 See generally Keon-Cohen (n 129) 23–4; Toni Bauman et al, 'Traditional Owner Agreement-Making in Victoria: The Right People for Country Program' (2014/2015) 18(1) *Australian Indigenous Law Review* 78.

133 Strelein, 'Reforming the Requirement of Proof' (n 78) 9.

134 See Patrick McCabe, '*Pilki* and *Birriliburu*: Commercial Native Title Rights after *Akiba*' (2015/2016) 19(2) *Australian Indigenous Law Review* 64, 64–5 ('*Pilki* and *Birriliburu*'). For a discussion of a rare trial finding of trading rights see the discussion of the *Alyawarr* litigation (overturned on appeal): at 64–5. For discussion of rare examples (and some ambiguity on this point) in earlier consent determinations, see Strelein, 'The Right to Resources and the Right to Trade' (n 18) 50.

135 See, eg, Lauren Butterly, 'Unfinished Business in the Straits: *Akiba v Commonwealth of Australia* [2013] HCA 33' (2013) 8(8) *Indigenous Law Bulletin* 3; McCabe, '*Pilki* and *Birriliburu*' (n 134); Gabrielle Lauder and Lisa Strelein, 'Native Title and Commercial Fisheries: The Torres Strait Sea Claim' (2013) 118 *Precedent* 13; Edgeworth (n 27). See generally Brennan et al (eds) (n 2).

136 Anne Hewitt, 'Commercial Exploitation of Native Title Rights: A Possible Tool in the Quest for Substantive Equality for Indigenous Australians?' (2011) 32 *Adelaide Law Review* 227. See also *Rrumburriya Borroloola Claim Group v Northern Territory* (2016) 255 FCR 228, 242 [80] ff (Mansfield J).

137 See, eg, *Yarmirr v Northern Territory* (1998) 82 FCR 533.

138 See, eg, *Commonwealth v Yarmirr* (1999) 101 FCR 171. For a discussion of this thinking and its development (and its lingering presence in argument but ultimate rejection in the *Akiba* litigation

relevant pre-sovereignty activity and a reluctance to translate[139] evidence of pre-sovereignty exchange into commercial and trading rights.[140]

A Earlier Judicial Opposition to the Constraints

The final obstacles noted above[141] reflected, of course, the deeper-set problems in the Australian law. And it is important to recall at this juncture that the *Akiba* correction emerges from a more complex history of judicial disquiet. On the issue of content there have long been glimpses of broader thinking. In the first place, the 'right/exercise' distinction was not entirely without support in the formative Australian precedent. Most visibly, in *Yarmirr* Kirby J had emphasised that the 'present content' of native title may reflect a 'modern' form of exercise of traditional laws and customs.[142] Less directly (for example), Gummow J in *Yanner* had noted that '[t]he exercise of the native title right to hunt was a matter within the control of the appellant's indigenous community'.[143] Interestingly however, most references to a 'right/exercise' distinction came in the context of proof (returned to below).

Signs of a broader conceptualisation of the interest had come in other forms also, most conspicuously in lower court judgements from *Ward*.[144] Alongside this, there had been cogitation on the possibility of post-sovereignty accrual of interests,[145] and various examples of emphasis on the need for rights to be 'adaptable'. Most conspicuously, Kirby J began to assemble in *Yarmirr* a concerted opposition to the strict thinking – emphasising the economic side of Indigenous land use, the fragility of specifically-defined rights, the inevitability of cultural adaptation, and the injustice of historicising the Aboriginal interest (at least where original exclusivity is established).[146] By the time of *Ward*, Kirby J's thinking had firmed. His Honour stressed that the object of the *Native Title Act 1993* (Cth) was 'the recognition of "native *title*", rather than the provision of a list of activities permitted on, or in relation to, areas

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(especially (2010) 204 FCR 1, [751]–[752])), see Strelein, 'The Right to Resources and the Right to Trade' (n 18) 52; Brennan (n 6) 34–5.

139 See, eg, *Northern Territory v Alyawarr* (2005) 145 FCR 442, 487–8 [156]–[157] (Wilcox, French and Weinberg JJ).

140 Hewitt (n 136) 242 ff. Not surprisingly the trend became to explicitly exclude commercial rights from applications and determinations (contested or consent): McCabe, '*Pilki* and *Birrililburu*' (n 134) 65.

141 See also the discussion in McCabe, '*Pilki* and *Birrililburu*' (n 134) and the examples cited there.

142 *Yarmirr* (2001) 208 CLR 1, 137–8 [309], citing, inter alia, *Mabo* (1992) 175 CLR 1, 70 (Brennan J), 110 (Deane and Gaudron JJ), 192 (Toohey J).

143 (1999) 201 CLR 351, 397 [115] (in the context of a consideration of the effect of regulation of that control).

144 See *Ward v Western Australia* (1998) 159 ALR 483, 505 ff (Lee J); *Western Australia v Ward* (2000) 99 FCR 316, 346, 372–4 (Beaumont and von Doussa JJ), 515, 526 ff (North J). Other notable glimpses in the formative jurisprudence include: *Native Title Act Case* (1995) 183 CLR 373, 450 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Yanner* (1999) 201 CLR 351, 372–3 [37]–[40] (Gleeson CJ, Gaudron, Kirby and Hayne JJ); *Wik* (1996) 187 CLR 1, 126–7 (Toohey J), 169 (Gummow J).

145 See, eg, *Commonwealth v Yarmirr* (1999) 101 FCR 171, 180–235 (Beaumont and von Doussa JJ).

146 *Yarmirr* (2001) 208 CLR 1, 118–9 [264], 131–4 [295]–[300], 142 [320] (Kirby J).

of land or waters'.[147] Building upon the dissent of North J in the Full Federal Court below,[148] Kirby J emphasised the need for the law to accommodate change and development in traditional laws and customs, and recognise the possibility of 'new aspects' of traditional rights and interests developing. And he considered, on the basis of principles of equality, that where a community's native title is established as conferring possession, occupation, use and enjoyment of the land and waters to the exclusion of others, there must be a presumption that such right carries with it the use and enjoyment of minerals and like resources (without separate inquiry regarding the identity of those resources).[149]

After *Ward*, while some of the succeeding lower court cases embraced the strict thinking,[150] others continued to search for breadth even within the somewhat crystallised restrictions then in place. Efforts included ongoing attempts to accommodate rights/interests significantly affected by or *arising from* change or adaptation in laws and customs,[151] and broader conceptualisations of (at least) the original interest.[152]

The prominent reference by Kirby J (above) to the presumptions attending 'exclusivity' is significant. It connects to a deep vein of logic found consistently in the comparative jurisprudence. This logic is most accessible in the 1997 Canadian decision of *Delgamuukw v British Columbia* where Lamer CJ confirmed that 'aboriginal title', established essentially upon proof of exclusive occupation at the acquisition of sovereignty (by reference to physical occupation and systems of Aboriginal law),[153] confers a right to the land itself (and its use for a variety of purposes).[154] However, the essential reasoning here has a longer pedigree. To cite just one further significant example, in a 1954 US Court of Claims decision it was stated:[155]

> The Government … denies that [the Tee-Hit-Ton], as a group or clan, owned anything. It says that even if they exploited certain lands for the purpose of taking fish or game or berries or roots from them, that was not ownership. We think that an entity, such as an individual, or a tribe or clan of Indians, which exploits land under a claim of right, to the exclusion of others, and takes from the land what is of interest to it, though what interests it might not interest others of a different culture, is asserting 'ownership' of that land.

147 (2002) 213 CLR 1, 243 [570].

148 *Western Australia v Ward* (2000) 99 FCR 316.

149 *Ward* (2002) 213 CLR 1, [569]–[575].

150 See especially *Daniel v Western Australia* [2003] FCA 666. Compare also the comments in *Sampi v Western Australia* [2005] FCA 777, especially 4–5 [10], 14 [42], 14–17 [44], 300 [1054], 304–6 [1069]–[1073] (French J); *Rubibi Community v Western Australia [No 6]* (2006) 226 ALR 676, 703–4 [118]–[119] (Merkel J); *Rubibi Community v Western Australia [No 7]* [2006] FCA 459, 3–4 [8]–[12] (Merkel J); *Western Australia v Sebastian* (2008) 173 FCR 1. Cf *Gumana v Northern Territory* (2005) 141 FCR 457, especially 493–7 [122]–[142], 529–30 [275] (Selway J).

151 See, eg, *Rubibi Community v Western Australia [No 5]* [2005] FCA 1025, 96 [266] (Merkel J); *Warrie (formerly TJ) v Western Australia* (2017) 365 ALR 624, 663–8 [126]–[148] (Rares J) ('*Warrie*').

152 See, eg, *Lardil Peoples v Queensland* [2004] FCA 298; *Neowarra v Western Australia* [2003] FCA 1402.

153 [1997] 3 SCR 1010, 1095–7 [140]–[143] (Lamer CJ for Lamer CJ, Cory and Major JJ, McLachlin J concurring at 1135 [209]).

154 Subject only to the limitation that uses must not be 'irreconcilable' with the nature of the attachment to the land: ibid 1083 [117].

155 *Tee-Hit-Ton Indians v United States*, 120 F Supp 202, 204 (Alaska, 1954) (Madden J) – implicitly approved in *Tee-Hit-Ton Indians v United States*, 348 US 272, 275, 285 (1955).

This thinking has now seeped some way into Australian approach to subsisting *exclusive* native title interests (see below), albeit having to work around the implications of *Ward* to do so.[156] Yet it was long missing in the Australian law, largely owing it seems to the prevalence of partial extinguishment (particularly of any rights of control) and an unspoken commitment to what might be termed a 'piñata' approach[157] to the effect of that partial extinguishment – namely that the subsisting rights necessarily tumbled out in very specifically-defined fragments of the former interest.[158] The logic of this has been under-examined.[159] Where there has been partial extinguishment, and even a technical loss of 'control', it is difficult to see why the original comprehensive and exclusive nature of the relationship should not inform the definition of the residual interest. And why should the occasional survival of 'exclusivity' or passing interferences to defeat it (each sometimes just an accident of the legal history) produce so great a difference in approach to the contemporary interest? The people and their custodianship remain, in either case, and it might seem that their interests should be respected to the limit of actual, necessary inconsistency (as per recent High Court direction). It is not surprising that Kirby J's clear dissenting voice emerged in *Yarmirr*, and that the recent breakthrough came in *Akiba*, as the loss of control or 'exclusivity' in those scenarios emerged not from inconsistent grants, but from more amorphous common law rights of public and international use. In that context, the 'piñata' logic looks particularly weak.

It might seem that the *Akiba* correction taps a wholly different vein of logic to that which Kirby J was exploring, as on its surface it just adopts a broader conceptualisation of a specific right (rather than the logic of 'ownership'). However, while this is a more measured response it does stem from a similar logic. Both approaches, at their core, draw from a greater respect for the dominion inherent in original Indigenous custodianship of lands and waters. The *Akiba* search for the 'underlying right' necessarily steers the inquiry back towards the original (most likely comprehensive and exclusive) interest. In a sense then the threads of the broader Australian thinking are converging on a more principled approach. The piñata thinking lies at the heart of the remaining difficulty, but *Akiba* has given us a way to begin re-aggregating the broken pieces. They can now be, at the very least, bigger pieces.[160]

B The Impact of *Akiba* So Far

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156 See also the discussions in Strelein, 'Reforming the Requirement of Proof' (n 78) 9; Strelein, 'The Right to Resources and the Right to Trade' (n 18) 48–9. But see, eg, *Western Australia v Willis* (2015) 239 FCR 175, 220–39 [115]–[218] (Barker J), cf 188 [37] (Dowsett J) ('*Pilki Appeal*').

157 See Young (n 63) 435.

158 See, eg, *Lardil Peoples v Queensland* [2004] FCA 298, [164]–[197] (Cooper J); *Neowarra v Western Australia* [2003] FCA 1402, [471]–[522], [771]–[783] (Sundberg J).

159 For some brief contemplation of alternative approaches: see, eg, *Gumana v Northern Territory* (2005) 141 FCR 457, 521–2 [235]–[240]. Cf the view of Kirby J in *Yarmirr* (2001) 208 CLR 1, 119–20 [268]–[269], 125–6 [280]–[282], 136–7 [305]–[307]. See also the comments on this point in works by Strelein: Strelein, *Compromised Jurisprudence* (n 16) 124–5; Lisa Strelein, 'From *Mabo* to *Yorta Yorta*: Native Title Law in Australia' (2005) 19 *Washington University Journal of Law and Policy* 225, 266–7 (particularly the author's reference to an 'exclusive possession-minus' methodology); and more recently Strelein, 'Reforming the Requirement of Proof' (n 78) 9 (and note the point made there that the wording of s 225 of the *Native Title Act 1993* (Cth) encourages this thinking).

160 It might be added here that the clear rejection in *Akiba* of the idea that the existence of commercial rights would depend upon the survival of 'exclusivity' (see especially *Akiba v Queensland [No 3]* (2010) 204 FCR 1, 187 [751]–[752] (Finn J)) signals a growing discontent with 'piñata' thinking more generally.

There was some risk that the *Akiba* reasoning might not reach far beyond its own facts. The offshore claims are somewhat unique both in terms of how exclusivity has been defeated (as noted above) and the focussing of competitive activity on particular finite resources. Moreover, the laws and customs evidence in *Akiba* highlighted utility and practicality in a manner not often seen in a jurisprudence built on tradition and spirituality.[161] Perhaps most importantly, there was strong evidence of historical and modern trading in *Akiba*[162] that might prove hard to replicate.[163] Yet the *Akiba* correction – through its simplicity, moderacy and timing – *has* produced significant progress on questions of content in the lower courts.

There was inevitably some lag as the courts dealt with claims that had been argued (or at least framed) before *Akiba*, and consent determinations continued to exclude commercial rights as per the long practice.[164] Yet *prospectively* the legal landscape had changed; there was significant encouragement (on the *Akiba* logic) to claim rights in broader terms – even if only in an attempt to avoid extinguishment by specific interferences.[165] This reveals that parties' strategies are now truly an inversion of those in the early years (discussed above), and that the arguments for broader interests put forward particularly in *Ward* were perhaps simply ahead of their time.

The 2014 decisions in *Willis v Western Australia* ('*Pilki*'),[166] and *BP (dec'd) v Western Australia* ('*Birriliburu*')[167] have been described as the 'first fruit' of the long search for commercial native title land use rights in Australia.[168] In both (short) cases North J upheld broadly worded claims to access and take resources for any purpose[169] (and a 2015 appeal from *Pilki* was unanimously dismissed).[170] North J (following comments in *Akiba*)[171] rejected the state government's complaints of 'lack of precision' in the broadly-cast rights, where established by the evidence.[172] Dowsett and Jagot JJ in the *Pilki* appeal similarly declined to draw distinctions as to purpose of use where the evidence did not show any such distinction in traditional laws and customs.[173]

In the 2016 decision of *Rrumburriya Borroloola Claim Group v Northern Territory*, the government parties again challenged a broadly phrased 'right to access and take for any

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161 Finn, 'A Judge's Reflections on Native Title' (n 7) 27. See also Lauder and Strelein (n 135).

162 See *Akiba v Queensland [No 3]* (2010) 204 FCR 1, 134 [526] (Finn J).

163 See McCabe, '*Pilki* and *Birriliburu*' (n 134) 66; see also Brennan (n 6) 34 ff.

164 See McCabe, '*Pilki* and *Birriliburu*' (n 134) 68.

165 Ibid 67. See also Patrick McCabe, 'Commercial Native Title Rights in 2018: A Belated New Dawn' AUSPUBLAW (Blog Post, 20 February 2019) <https://auspublaw.org/2019/02/commercial-native-title-rights-in-2018/> ('Commercial Native Title Rights in 2018').

166 [2014] FCA 714. See also *Willis v Western Australia [No 2]* [2014] FCA 1293.

167 [2014] FCA 715.

168 McCabe, '*Pilki* and *Birriliburu*' (n 134) 64–5.

169 See especially *Pilki* [2014] FCA 714, [115] ff (North J); *Birriliburu* [2014] FCA 715, [86] ff (Jagot J)

170 *Pilki Appeal* (2015) 239 FCR 175.

171 *Akiba* (2013) 250 CLR 209, 241–2 [65]–[68] (Hayne, Kiefel and Bell JJ).

172 *Pilki* [2014] FCA 714, [128] (North J). The exclusive nature of the native title determination in issue in *Pilki* was not a significant focus for North J, and he dismissed the State's concern that he was relying on 'ownership' assumptions (contrary to *Ward*) – on the basis that there was evidence here of underpinning traditional laws and customs: *Pilki* [2014] FCA 714, [134] (North J). See also *Birriliburu* [2014] FCA 715, [97], [103] (North J).

173 *Pilki Appeal* (2015) 239 FCR 175, 188–9 [37]–[39] (Dowsett J), 219 [112]–[113] (Jagot J) (albeit with some comments from Dowsett J about the unchallenged 'vagueness' of the claimant evidence).

purpose the resources of the area' (in the context of both exclusive and non-exclusive native title).[174] Relying on the reasoning in the *Pilki Appeal*, it was argued that at least if there was a distinction as to purposes in the relevant traditional law and custom, that would justify contemporary definition by purpose – as would other traditional constraints on use that directly or indirectly contradicted commercial purposes.[175] Mansfield J carefully traced the relevant jurisprudential history,[176] and evidence, and ultimately rejected the contended confinement of the right to personal or communal purposes of a domestic or subsistence nature, as there was no basis for that in the claimant or expert evidence.[177] His Honour also considered that customary constraints on use related to 'exercise' (not detracting from the rights themselves),[178] and expressly declined to limit the right in issue to resources historically used.[179] In another 2016 decision, *Narrier v Western Australia* ('*Narrier*'),[180] Mortimer J relied on key reasoning in the *Pilki Appeal* in similarly holding that the claim group had made out a 'right to access and take resources for any purpose, including commercial purposes' (in a finding of exclusive native title).[181]

In the initial cases North J had dismissed the 'large number' of earlier more limited consent determinations (as possibly reflecting negotiated compromise), and earlier more limited contested determinations (as reflecting different claims or different evidence).[182] Yet such reasoning just serves to underline the significance of *Akiba*, and the scale of the shift in the contemporary legal context. McCabe has traced the slow but clear emergence of the *Akiba*-type claim through the succeeding years.[183] In 2016, beyond the three contested successes already noted above[184] there were no apparent inroads into consent determinations. In 2017 there were numerous consent determinations in the old style, and finally one including an *Akiba* right.[185] However, in 2018 there were several determinations of *Akiba* rights (mostly by consent) – albeit with a larger number of consent determinations still following old formats (see further below).

C Accompanying Developments

174 (2016) 255 FCR 228, 232 [10] (Mansfield J). See also *Rrumburriya Borroloola Claim Group v Northern Territory [No 2]* [2016] FCA 908.

175 *Rrumburriya Borroloola Claim Group v Northern Territory* (2016) 255 FCR 228, 241 [76] (Mansfield J).

176 Ibid 242 [80] ff.

177 This and other findings were included in the Australian Law Reports: *Isaac (Rrumburriya Borroloola Claim Group) v Northern Territory* (2016) 339 ALR 98, 160 [364].

178 Ibid 160 [363].

179 Ibid 157 [348] ff.

180 [2016] FCA 1519.

181 See especially ibid [32], [883]–[913]. Cf *Murray* [2016] FCA 752, [48], [643]–[699] (McKerracher J). Contrast, however, *Croft (Barngarla Native Title Claim Group) v South Australia* (2015) 325 ALR 213, 251 [198] ff, 339 [731] ff (Mansfield J).

182 See especially *Pilki* [2014] FCA 714, [129]–[130]. See also *Birriliburu* [2014] FCA 715, [98]–[99] (North J); *Rrumburriya Borroloola Claim Group v Northern Territory* (2016) 255 FCR 228, 243 [84] ff (Mansfield J).

183 McCabe, 'Commercial Native Title Rights in 2018' (n 165).

184 *Murray* [2016] FCA 752; *Rrumburriya Borroloola Claim Group v Northern Territory* (2016) 255 FCR 228; *Narrier* [2016] FCA 1519.

185 See *Atkins v Western Australia* [2017] FCA 1465.

There have been some significant complementary developments. The notion of 'exclusivity' – which as explained above is critical in the comparative jurisprudence and in the more strident Australian dissents – has been evolving in the Australian cases. In the first place, as Bartlett has carefully explored, there has been an incremental lowering of the notional bar for its survival.[186] Most importantly, in *Banjima People v Western Australia*[187] the Full Federal Court emphasised the centrality in this regard of shared Indigenous acknowledgement of permission and control rules under traditional laws and customs (and accompanying spiritual or other sanctions) – rather than acts of physical barring or eviction.[188] More recently, in *Warrie (formerly TJ) v Western Australia*[189] the court similarly emphasised the vitality of belief in requirements of permission and spiritual sanctions (despite adaptations) as evidence of ongoing traditional laws and customs signifying 'control',[190] and downplayed the significance of interference by non-Aboriginal people.[191]

The question of whether findings of surviving exclusivity have been properly respected and translated, in contemporary determinations, is returned to below. At this point, it is important to note that at least the establishment of this critical feature of a claim (providing the perimeter protection of the fabled 'right against the whole world') [192] can be approached in a responsive manner.[193] Moreover, it may well be, given the tenor of recent High Court extinguishment cases, that we must soon reconsider the legal fragility of such exclusivity. There is now an argument that findings about past extinguishment of the right 'to speak for country', or to make decisions about access and use, will need to be carefully considered in light of the strengthening preference for mere suppression.[194] Importantly, in addition to implications for usage rights (explored above), the right to exclusivity helps to protect a community's right *not* to develop or commercialise. The prospect that exclusivity is now more obtainable and potentially more sustainable highlights again that the threads of the Australian law are converging on a more principled native title doctrine.

The other important development in the context of native title content, coming in the wake of *Akiba*, has been the belated emergence in the *Griffiths* litigation of a compensation methodology in relation to contemporary (compensable) extinguishment. The economic loss component of the compensation order there (for the itemised non-exclusive and non-commercial rights in issue)[195] dropped through the course of the appeals – from 80% to 65%

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186 See Richard Bartlett, 'Native Title Rights to Exclusive Possession, Use and Enjoyment and the Yinjibarndi' (2018) 43(1) *University of Western Australia Law Review* 92 ('Native Title Rights to Exclusive Possession'), and note the older cases cited there.

187 (2015) 231 FCR 456.

188 Ibid 467 [23], 470–4 [33]–[44] (The Court). See also *Narrier* [2016] FCA 1519, [871] ff.

189 (2017) 365 ALR 624.

190 Ibid 644 [44], 663 [126], 666 [141], 668 [149]–[151], 722 [381] (Rares J).

191 Ibid 659 [106] ff, 666 [141] ff. See Bartlett, 'Native Title Rights to Exclusive Possession' (n 186) 106.

192 Bartlett, 'Native Title Rights to Exclusive Possession' (n 186) 105. See also *Northern Territory v Griffiths (dec'd)* (2019) 364 ALR 208, 229 [69] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) ('*Griffiths*').

193 As to the growing prevalence of 'exclusive' determinations, see Belinda Burbidge, 'Native Title Snapshot 2018' [2018] (2) *Native Title Newsletter* 10–11 (note however the disproportionate accumulation in Western Australia).

194 See Brennan (n 6) 42.

195 See *Griffiths* (2019) 364 ALR 208, 214 [10], cf 229 [69]–[70], 240 [106] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). This key joint judgment is the focus here.

to 50% of freehold equivalent value.[196] In this respect the High Court did ultimately refocus some attention on the spiritual side of the native title interest[197] (a substantial award for *non-economic* loss was upheld in the appeals).[198] So while the total figures involved ensure that there will be renewed effort in negotiations across the country,[199] perhaps some gloss came off the possibility that this litigation might a catalyst for better acknowledgment and realisation of the economic potential of native title.[200] However, the clear postulation in economic loss calculations of a freehold equivalent valuation for an exclusive interest (from which deductions were to be made here),[201] and the robust conclusions on non-economic loss,[202] reflect and support the broader understanding of the nature and depth of the native title interest.[203] Moreover, *Griffiths* underscores the importance of properly exploring the *Akiba* thinking and its implications[204] – to prevent artificial and jurisprudentially accidental confinements of native title being enshrined in compensation awards.

The compensation litigation also has a more subtle relevance to the arguments here. As McGrath has noted, expert evidence in native title has to this point been largely directed to questions about the survival and surviving nature of the interest – namely whether and how it has endured colonisation. *Griffiths* signals a shift. Experts must now turn their minds to the 'shadow side of survival' – loss – and fully articulate the qualities and consequences of the impacts that accompany the loss of rights and connection.[205] This is a potentially significant turn in a legal history that has been only narrowly and selfishly interested in 'impact'. Abstract questions of legal extinguishment tended to steer the doctrine in the critical formative years, which contributed to the doctrinal problems that are only now being untangled.[206] It seems very likely that this new, belated focus on what has in fact been 'lost' can only help to build a truer understanding of the comprehensive nature of First Peoples' relationships with land. It was, perhaps, a significant missing ingredient in the courts' earlier grappling with these important legal, social and economic questions.

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196 Ibid 240 [106]. See (earlier) *Northern Territory v Griffiths* (2017) 256 FCR 478; and *Griffiths v Northern Territory [No 3]* (2016) 337 ALR 362.

197 See *Griffiths* (2019) 364 ALR 208, 255 [153] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), quoting key passages from *Ward* (2002) 213 CLR 1, 64–5 [14] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

198 *Griffiths* (2019) 364 ALR 208, 273 [237] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

199 See, eg, *Pearson v South Australia (Tjayuwara Unmuru Native Title Compensation Claim)* [2017] FCA 1561.

200 See, eg, Webb, '2016 Sir Frank Kitto Lecture' (n 28) 123; Keon-Cohen (n 129) 15 ff.

201 See especially *Griffiths* (2019) 364 ALR 208, 212 [2], 229 [70], 230 [74], cf 226–7 [62]–[64] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). As to the relevance of inalienability, see generally *Griffiths* (2019) 364 ALR 208, 238 [99] ff (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

202 Ibid 255 [152] ff (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

203 See also ibid 237 [96] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) (reference to the 'rights' v 'exercise' distinction); '[T]he value of the native title rights and interests is not ordinarily to be confined to the benefit of their past uses but should be extended to their highest and best use': at 237 [97] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

204 See in this regard ibid 230 [74], 234 [87], 240 [106] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

205 Pamela Faye McGrath, 'Native Title Anthropology after the Timber Creek Decision' (2017) 6(5) *Land, Rights, Laws: Issues of Native Title* 1. See also *Griffiths* (2019) 364 ALR 208, 223 [46], 255 [154], 256 [159] ff, [166] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ.

206 See above Parts II and III(A).

V IMPLICATIONS FOR EXISTING DETERMINATIONS

As noted at the outset, a looming problem now is the awkward shadow that the *Akiba* conceptual advances cast on many past determinations. As a result of the legal history explored earlier, and government interpretations of it,[207] limitations have been built into many of those determinations (both contested and consent). And the analysis above indicates that the old thinking will linger for a time in new ones.

A close survey of the qualifications found in recent (ultimately) consent determinations[208] illustrates some post-*Akiba* expansion of thinking – but also (very clearly) the consistency and tenacity of the past trends and the nature of the potential pre-*Akiba* 'deficit' we are left with. These determinations regularly feature:

- detailed itemisation of permissible activities in non-exclusive determinations;[209]

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207 Strelein, 'Reforming the Requirement of Proof' (n 78) 9.

208 From January 2018 to mid-March 2019 – the relevant determinations (in chronological order) being: *Forrest (Ngurrara People) v Western Australia* [2018] FCA 289 ('*Forrest*'); *Agius v South Australia* [2018] FCA 358 ('*Agius*'); *Croft (Barngarla Native Title Claim Group) v South Australia [No 3]* [2018] FCA 552 ('*Croft*'); *Lightning (Nywaigi People) v Queensland* [2018] FCA 493 ('*Lightning*'); *Hamlett (Wajarri Yamatji People) v Western Australia* [2018] FCA 545 ('*Hamlett*'); *Doolan (Andado, Pmere Ulperre, New Crown and Therreyererte Family Groups) v Northern Territory* [2018] FCA 709 ('*Doolan*'); *Finlay (Kuruma Marthudunera Peoples) v Western Australia* [2018] FCA 548 ('*Finlay*'); *Manado (Bindunbur Native Title Claim Group) v Western Australia* [2018] FCA 854 ('*Manado 1')* (but see appeal *Manado (Bindunbur Native Title Claim Group) v Western Australia* [2018] FCAFC 238); *Jack (Imarnt, Titjikala and Idracowra Estates) v Northern Territory* [2018] FCA 708 ('*Jack*'); *Glenn (Alherramp, Arempey, Lyelyepwenty, Ngwenyenp and Tywerl Landholding Groups) v Northern Territory* [2018] FCA 889 ('*Glenn*'); *Breadon (Inteyere, Twenge, Ipmengkere, Murtikutjara, Aniltika and Nthareye Landholding Groups) v Northern Territory* [2018] FCA 890 ('*Breadon*'); *Western Bundjalung People v A-G (NSW)* [2018] FCA 970 ('*Torrens*'); *Holborow (Yaburara & Mardudhunera People) v Western Australia [No 3]* [2018] FCA 1108 ('*Holborow*'); *Muriata (Girramay People #2) v Queensland* [2018] FCA 1120 ('*Muriata*'); *Muir (Manta Rirrtinya People) v Western Australia* [2018] FCA 1388 ('*Muir*'); *Wiggan (Mayala People) v Western Australia* [2018] FCA 1485 ('*Wiggan*'); *Tex (Lappi Lappi and Ngulupi Claim Group) v Western Australia* [2018] FCA 1591 ('*Tex'*); *Wavehill (Wubalawun Group) v Northern Territory* [2018] FCA 1602 ('*Wavehill*'); *Margarula (Mirarr People) v Northern Territory* [2018] FCA 1670 ('*Margarula*'); *Drury (Nanda People) v Western Australia* [2018] FCA 1849 ('*Drury*'); *Oxenham (Malgana People) v Western Australia* [2018] FCA 1929 ('*Oxenham*'); *Sturt (Jaru Native Title Claim) v Western Australia* [2018] FCA 1923 ('*Sturt*'); *Egan (Wajarri Yamatji People) (Part C) v Western Australia* [2018] FCA 1945 ('*Egan*'); *Gordon (Kariyarra Native Title Claim Group) v Western Australia* [2018] FCA 1990 ('*Gordon*'); *Coulthard v South Australia* [2018] FCA 1993 ('*Coulthard*'); *Street (Giniyjawarrni Yoowaniya Riwi Native Title Claim Group) v Western Australia* [2018] FCA 2019 ('*Street*'); *Jessell (Goorring Native Title Claimants) v Western Australia* [2018] FCA 2047 ('*Jessell*'); *Smirke (Jurruru People) v Western Australia* [2018] FCA 2079 ('*Smirke*'); *Manado (Bindunbur Native Title Claim Group) v Western Australia* [2019] FCA 30 ('*Manado 2*'); *Taylor (Gangalidda People) v Queensland* [2019] FCA 302 ('*Taylor 1*'), *Taylor (Gangalidda People) v Queensland* [2019] FCA 297 ('*Taylor 2*'); *O'Connor (Palyku People) v Western Australia* [2019] FCA 330 ('*O'Connor*').

209 See especially *Muriata* [2018] FCA 1120; *Lightning* [2018] FCA 493; *Finlay* [2018] FCA 548; *Hamlett* [2018] FCA 545; *Jack* [2018] FCA 708; *Glenn* [2018] FCA 889; *Breadon* [2018] FCA 890; *Torrens* [2018] FCA 970; *Holborow* [2018] FCA 1108; *Margarula* [2018] FCA 1670; *Drury* [2018] FCA 1849; *Oxenham* [2018] FCA 1929; *Sturt* [2018] FCA 1923; *Coulthard* [2018] FCA 1993; *Smirke* [2018] FCA 2079; *O'Connor* [2019] FCA 330; *Taylor 2* [2019] FCA 297. Cf *Agius* [2018] FCA 358; *Doolan* [2018] FCA 709; *Croft* [2018] FCA 552; *Gordon* [2018] FCA 1990. Contrast *Manado 1* [2018] FCA 854; *Muir* [2018] FCA 1388; *Wiggan* [2018] FCA 1485; *Wavehill* [2018] FCA 1602; *Forrest* [2018] FCA 289; *Street* [2018] FCA 2019 (note the *inclusive* lists in some of these).

- explicit general exclusion (albeit variously placed) of commercial activities in non-exclusive[210] and/or exclusive[211] determinations;
- overarching qualification that the native title is subject to and exercisable in accordance with 'traditional laws and customs' in non-exclusive[212] and/or exclusive[213] determinations;
- confinement to the use of 'traditional resources' in non-exclusive[214] determinations;
- confinement to 'personal, domestic and communal purposes' in non-exclusive[215] and/or exclusive[216] determinations.

Some of the potential limitations in these terms might simply be reinterpreted. Prior to *Akiba* the term 'traditional' (and the 'laws and customs' it attached to) remained heavily loaded with the theorising of *Ward* and *Yorta Yorta* – anchored securely to pre-sovereignty times and implicitly very particularised. It was difficult to avoid the conclusion that this confinement would follow the communities (with determinations consistently deferring to the phrase) into the future, as something of a Trojan horse.[217] Now, however, an overarching qualification that the determined native title is subject to and exercisable in accordance with 'traditional laws and customs' might be read in light of the clarification that it is to be defined by reference to

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210 *Agius* [2018] FCA 358; *Muriata* [2018] FCA 1120; *Lightning* [2018] FCA 493; *Doolan* [2018] FCA 709; *Croft* [2018] FCA 552; *Jack* [2018] FCA 708; *Glenn* [2018] FCA 889; *Breadon* [2018] FCA 890; *Holborow* [2018] FCA 1108; *Margarula* [2018] FCA 1670; *Drury* [2018] FCA 1849; *Coulthard* [2018] FCA 1993; *Gordon* [2018] FCA 1990; *Smirke* [2018] FCA 2079; *O'Connor* [2019] FCA 330; *Taylor 2* [2019] FCA 297. Contrast *Forrest* [2018] FCA 289; *Hamlett* [2018] FCA 545; *Manado 1* [2018] FCA 854; *Muir* [2018] FCA 1388; *Wiggan* [2018] FCA 1485; *Wavehill* [2018] FCA 1602; *Sturt* [2018] FCA 1923; *Street* [2018] FCA 2019.

211 *Muriata* [2018] FCA 1120; *Lightning* [2018] FCA 493, however note the potential ambiguity of the formatting: at [6] of the determination; *Croft* [2018] FCA 552; *Drury* [2018] FCA 1849; *Taylor 1* [2019] FCA 302; *Taylor 2* [2019] FCA 297, note again, however, the formatting: at [6] of each of the Taylor determinations. Contrast *Forrest* [2018] FCA 289; *Hamlett* [2018] FCA 545; *Manado 1* [2018] FCA 854; *Muir* [2018] FCA 1388; *Wiggan* [2018] FCA 1485; *Tex* [2018] FCA 1591; *Egan* [2018] FCA 1945; *Sturt* [2018] FCA 1923; *Jessell* [2018] FCA 2047; *Street* [2018] FCA 2019; *Gordon* [2018] FCA 1990; *Manado 2* [2019] FCA 30.

212 *Agius* [2018] FCA 358; *Muriata* [2018] FCA 1120; *Lightning* [2018] FCA 493; *Forrest* [2018] FCA 289; *Doolan* [2018] FCA 709; *Finlay* [2018] FCA 548; *Croft* [2018] FCA 552; *Hamlett* [2018] FCA 545; *Manado 1* [2018] FCA 854; *Jack* [2018] FCA 708; *Glenn* [2018] FCA 889; *Breadon* [2018] FCA 890; *Torrens* [2018] FCA 970; *Holborow* [2018] FCA 1108; *Muir* [2018] FCA 1388; *Wiggan* [2018] FCA 1485; *Margarula* [2018] FCA 1670; *Drury* [2018] FCA 1849; *Wavehill* [2018] FCA 1602; *Oxenham* [2018] FCA 1929; *Sturt* [2018] FCA 1923; *Street* [2018] FCA 2019; *Gordon* [2018] FCA 1990; *Coulthard* [2018] FCA 1993; *Smirke* [2018] FCA 2079; *O'Connor* [2019] FCA 330; *Taylor 2* [2019] FCA 297.

213 *Muriata* [2018] FCA 1120; *Lightning* [2018] FCA 493; *Forrest* [2018] FCA 289; *Finlay* [2018] FCA 548; *Croft* [2018] FCA 552; *Hamlett* [2018] FCA 545; *Manado 1* [2018] FCA 854; *Muir* [2018] FCA 1388; *Wiggan* [2018] FCA 1485; *Tex* [2018] FCA 1591; *Drury* [2018] FCA 1849; *Egan* [2018] FCA 1945; *Oxenham* [2018] FCA 1929; *Sturt* [2018] FCA 1923; *Jessell* [2018] FCA 2047; *Gordon* [2018] FCA 1990; *Street* [2018] FCA 2019; *Manado 2* [2019] FCA 30; *Taylor 2* [2019] FCA 297; *Taylor 1* [2019] FCA 302.

214 *Finlay* [2018] FCA 548; *Torrens* [2018] FCA 970; *Holborow* [2018] FCA 1108; *Oxenham* [2018] FCA 1929; *Gordon* [2018] FCA 1990; *Smirke* [2018] FCA 2079; *O'Connor* [2019] FCA 330.

215 *Finlay* [2018] FCA 548; *Torrens* [2018] FCA 970 (in the context of water); *Oxenham* [2018] FCA 1929.

216 *Finlay* [2018] FCA 548; *Oxenham* [2018] FCA 1929.

217 Cf the comments in Walker (n 17) 14, 20–1.

'underlying rights' rather than specific exercises of them – and a fuller respect for the prior dominion inherent in original custodianship of lands. In the case of non-exclusive title, this de-focuses any limitation. In the case of exclusive title, this brings us within reach of the comprehensive interest proffered by the comparative jurisprudence and early Australian dissents. In the new legal landscape this common qualification, sheered of undue external limitations it might invoke, perhaps rightly becomes essentially an acknowledgment of the community's internal control of inter se organisation and entitlement. An anti-waste type protection might conceivably be found within this qualification, given that it is not a reason to withhold an 'any purpose' definition of rights.[218] If this were to carry an element of external limitation on the native title, this would be not dissimilar to the 'irreconcilable uses' limitation found in the *Delgamuukw* doctrine[219] and now rationalised in Canada on principles of intergenerational equity. Irrespective of the appropriateness of such a limitation, it has not proved in practice to be a great source of contention in Canada.[220]

The amorphous confinement of use to 'traditional resources', where it is found, might similarly be read in light of the de-focusing language and logic of *Akiba*. It may prove to be more obstinate given the deliberate 'dating' of the term 'traditional' in *Yorta Yorta*; loosening the restriction might depend on how broadly 'resources' can be delineated.[221] Yet it is important to remember here the emerging understanding that the scope of underlying rights is not dependent on 'activity evidence' (as explored further below). It is interesting that this version of limitation only appears to have been added in respect of non-exclusive native title in the 2018 determinations – a vestige it seems of the piñata theory of partial extinguishment (discussed above),[222] but one that can now be mitigated by the 're-aggregation' of rights offered by *Akiba*.

Implicit exclusions of commercial activity might similarly be corrected, or partially corrected, by the broadening tenor of thinking. For example, a confinement of use to 'personal, domestic and communal purposes' can now be read in light of the fact that communal commercial rights are recognised.[223] Some difficult interpretive exercises might lay ahead,[224] however the legal, moral and economic logic of the *Akiba* correction should in time produce some significant momentum. Certainly it seems that implicit *inclusions* of commercial activity[225] can now be readily embraced.

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218 See, eg, *Pilki* [2014] FCA 714, [126] (North J) (approving comments of Finn J in *Akiba v Queensland [No 3]* (2010) 204 FCR 1, 133–4 [523]–[524]). But see the doubts expressed on this point in McCabe, '*Pilki* and *Birriliburu*' (n 134) 71.

219 See *Delgamuukw v British Columbia* [1997] 3 SCR 1010. See also Hewitt (n 136) 261.

220 For fuller discussion of the development of this limitation in Canada, see Sharon Mascher and Simon Young, 'Rights-Based "Recognition": The Canadian Experience' in Simon Young, Jennifer Nielsen and Jeremy Patrick (eds), *Constitutional Recognition of First Peoples in Australia: Theories and Comparative Perspectives* (Federation Press, 2016) 176, 192–205.

221 Note in this regard the robust approach taken by Mansfield J in *Rrumburriya Borroloola Claim Group v Northern Territory* (2016) 255 FCR 228 (discussed above).

222 Compare in this regard the earlier thinking that recognition of commercial rights necessarily depended on an entitlement to exclusive possession (discussed above in Part IV).

223 Moreover, as Strelein has argued, the notion of 'communal needs' can logically cover economic development needs: Strelein, 'The Right to Resources and the Right to Trade' (n 18) 51.

224 As another example of possible implied exclusion, an ostensibly broad right (ie, covering commercial uses) might be implicitly limited by a reference in later clauses to sharing or exchanging 'subsistence and other traditional resources': see the discussion in McCabe, '*Pilki* and *Birriliburu*' (n 134) 68.

225 See the older examples noted in Strelein, 'The Right to Resources and the Right to Trade' (n 18) 50.

The remaining limitations noted above raise more difficult questions. The highly detailed itemisation of permissible activities in many non-exclusive determinations,[226] and the express excision of commercial activities in many exclusive and non-exclusive determinations, are far more difficult to work around.[227] Yet for various reasons the deficit now clearly visible in the large body of past determinations cannot be ignored. Obviously, there is no logic in imagining now that these communities' connection with lands and waters was in all cases somehow more limited and specific than that of the post-*Akiba* claimants. A proper respect for these communities, and for the integrity of the native title regime, requires some careful review and action. In practical terms, the relative strengths of a community's surviving native title rights (as determined) can be critically important in various future negotiations.[228] Moreover, as we now enter a new era, with a focus on valuing and compensating for post-1975 extinguishment, it will be important to proceed from a settled and accurate understanding of the extant rights that have suffered recent interference. Just as importantly, the terms of past determinations (through variation and the freezing of things despite unpredictable future context) might seem to unduly place communities on a path to internal and external conflict[229] – and this must be borne in mind in any retrospective review.

The old constrictions in the Australian doctrine are deeply embedded, and the substantial precedent of past determinations will take some dislodging (particularly in negotiations) – as evidenced by the inertia in the 2018 determinations surveyed above. It would seem that inaction, or piecemeal action, will just allow the problem to compound. Clearly there is little to be gained by drawing communities and courts back to the task of formal proof of reframed claims. Given this, and the sobering reality that similar questions might arise in future reckonings with past conclusions on extinguishment, supplementary consultation and negotiation must be the way forward. The courts have the tools in section 13 of the *Native Title Act 1993* (Cth) to reopen finalised determinations (including simply in 'the interests of justice'),[230] but it must be hoped that such a process can be approached in a general and consultative way, rather than left to communities to activate – in a sense to begin again. A general process could benefit from the significant trans-Australian anthropological evidence produced in recent cases (see below), and the logical starting presumption that communities across Australia generally enjoyed a similarly comprehensive connection with and dominion over lands. Presumptions led us in to this legal, moral and economic corner – and informed presumptions might lead us out.

VI IMPLICATIONS FOR PROOF

226 For older examples of itemisation in *exclusive* determinations, see ibid 44, 50–1.

227 Assuming that a link to itemised activities is required: note however, the possible alternative approach alluded to in ibid 51.

228 For example, there is evidence of significant discrepancy in resources driven agreements across the country – and one identified factor behind this is the relative strength of remaining native title rights: see Lily O'Neill, 'The Role of State Governments in Native Title Negotiations: A Tale of Two Agreements' (2015/2016) 18(2) *Australian Indigenous Law Review* 29.

229 See Walker (n 17) 20–1.

230 See *Native Title Act 1993* (Cth), s 13(5) – and note discussion in McCabe, '*Pilki* and *Birriliburu*' (n 134) 72 (particularly the point that implementation of the Australian Law Reform Commission recommendation to substitute a new s 223(2) – expressly recognising possible 'any purpose' rights, including commercial rights, and including references to 'trading' in the express examples – would potentially make the case for s 13 variation stronger). See also *Warrie* (2017) 365 ALR 624 (in the context of a reassessment (some years later) of 'exclusivity' under particular traditional laws and customs: 716–22 [360]–[382] (Rares J)).

A The Establishment of Broader Rights

The initial question, in the context of proof, is how are broader *Akiba*-style rights to be established? Obviously, the conceptual advances explored above (in the context of content) would be quickly denuded of meaning if specific evidence of all 'exercises' was still needed to prove the broader 'underlying right'. Theoretically, such itemised proof was always possible – but of course the tendency to require such specific evidence, and the burden this imposed,[231] helped to underwrite the confinement of content. While in *Akiba* itself there was significant evidence of commercial activity (the trading of marine resources),[232] *Akiba*'s broader framing of rights necessarily led us back to perennial concerns about any *insistence* on specific evidence: why should variations of significant traditional activities, for which there was no need or no opportunity in the past, be withheld from the contemporary community?[233] A broader framing of rights must be justified, but it would seem that this should logically be assisted by the strengthening respect for the comprehensive connections underlying original custodianship – and indeed would often be more easy to support with evidence from claimant witnesses than disaggregated and decontextualised specific entitlements.[234]

In the critical *Pilki* decision,[235] where these questions were squarely in issue, North J dismissed the State's attempt to narrow the right by pointing to a lack of evidence about actual commercial activity.[236] He rejected the logic of a requirement that 'activity' is necessary to establish that the right exists.[237] His own focus was on the existence of the right under established 'traditional laws and customs' (albeit activity might assist with this inquiry), and he noted that freehold owners need not show the exercise of all their rights to prove they exist.[238] On this approach, and acknowledging that the country in question was harsh, sparsely populated and had limited resources to be traded,[239] he found particularly on the expert evidence that the broadly framed right did exist here.[240] He felt the State had not engaged properly with the expert evidence, and noted that there was both substantive evidence about relevant laws and customs and (if necessary) examples of relevant activities – all supported by the expert evidence.[241] And his Honour dismissed the relevance of constraints under 'internal rules'.[242]

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231 See the discussion in Lauder and Strelein (n 135) 14; and the conspicuous example considered there from *Yarmirr v Northern Territory [No 2]* (1998) 82 FCR 533.

232 *Akiba v Queensland [No 3]* (2010) 204 FCR 1, 134 [526] (Finn J). See also the discussion in Brennan (n 6) 34 ff.

233 See, eg, Lauder and Strelein (n 135) 15; Finn, '*Mabo* into the Future' (n 128) 6. And note the comments of Kirby J in *Ward* (2002) 213 CLR 1, 243–5 [569]–[575] – discussed in detail above at Part IV(A).

234 As to the latter point, see further McCabe, '*Pilki* and *Birriliburu*' (n 134) 67.

235 *Pilki* [2014] FCA 714.

236 Ibid [118]–[127].

237 Ibid [118]. See also *Birriliburu* [2014] FCA 715, [89] (North J).

238 *Pilki* [2014] FCA 714, [118]. See also *Birriliburu* [2014] FCA 715, [89]–[90] (North J).

239 See *Pilki* [2014] FCA 714, [122] (North J). See also *Birriliburu* [2014] FCA 715, [92] (North J).

240 See *Pilki* [2014] FCA 714, [116] (North J).

241 See ibid [123]–[124] (North J). And his Honour found that the pre-sovereignty and post-sovereignty activity reflected a 'continuum of trading activity of a similar nature': at [125]. See also *Birriliburu* [2014] FCA 715, [91], [93], [100] (North J).

242 See *Pilki* [2014] FCA 714, [126] (North J). See also *Birriliburu* [2014] FCA 715, [95] (North J).

In the *Pilki* appeal, Dowsett and Jagot JJ similarly held that proof of trading/commercial activity was not an essential precondition to the establishment of the right.[243] Dowsett J emphasised that the question will be whether the evidence establishes that 'a claimed right or interest is recognised by traditional law and custom', but noted that a claim group need not prove a 'specific canon of traditional law and custom' dealing with commercial resource use.[244] Yet the detail of their Honours' reasoning left the *Pilki* precedent looking somewhat fact-specific. Jagot J had particularly referred (as context for the rejection of any excision of commercial purposes) to: the relative lack of challenge to the *Pilki* evidence (and the strength of the central cultural evidence); the evidence about the 'opportunistic nature' of resource use by these societies; the location of the claim area in a larger overall system (and its relationship with ancient trade routes); and the limited resources available.[245]

The reasoning in the succeeding decision of *Rrumburriya Borroloola Claim Group v Northern Territory*[246] left a similar sense – Mansfield J noting at the outset that the traditional laws and customs and expert evidence examined in *Pilki* did not necessarily 'transport' to the present claim.[247] Yet his Honour clearly stated his view that 'the difference between the existence of a right under traditional laws and customs is (as North J said) logically separate from the fact of its exercise … it is the possession of the right, not its exercise, which is the proper question'.[248] He ultimately confirmed it will be necessary to show a traditional right to take resources – and that evidence of exercise might inform the inquiry, as might expert evidence (as in *Pilki*) – but emphasised that each case will depend on the nature and quality of the evidence adduced.[249] In this instance, particular reference was made to evidence of historical trading activities with Macassans[250] (carefully located within the 'normative system' of traditional laws and customs[251]), which was considered to be the exercise of unrestricted rights to control the region and to access and take the resources without restriction.[252] In *Narrier*, where a broadly-cast right to resources was upheld again, Mortimer J was less circumspect in seeking the broad right under traditional law and custom (by reference to cultural and expert evidence) and rejecting any general requirement of activity evidence[253] – expressing a preference[254] for the key

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243 *Pilki Appeal* (2015) 239 FCR 175, 187 [36] (Dowsett J), 215 [99] (Jagot J) (but note Jagot J's rider at 215 [100] and at 233–4 [188]–[190] (Barker J) – albeit that he agreed on the outcome). Barker J in fact considered that ordinarily activity evidence would be needed – but he did confirm that each case will depend on the nature and quality of the evidence led: at 229–30 [169]–[170].

244 *Pilki Appeal* (2015) 239 FCR 175, 187–8 [36]–[37]. In effect, he said, the claim group must show that 'had the question of taking for commercial purposes arisen…traditional law and custom would have permitted the claim group to act in the relevant way': at [37].

245 See especially ibid 219 [112]. See also ibid 190 [44] (Dowsett J).

246 (2016) 255 FCR 228.

247 Ibid 246 [107].

248 Ibid 247 [110]. Cf *Murray* [2016] FCA 752, [48], [442], [681] (McKerracher J).

249 *Rrumburriya Borroloola Claim Group v Northern Territory* (2016) 255 FCR 228, 251 [131].

250 This reference was excluded from the Federal Court Reports, but was included in the Australian Law Reports: *Isaac (Rrumburriya Borroloola Claim Group) v Northern Territory* (2016) 339 ALR 98, 148 [307], 152–3 [324], 156 [339] (Mansfield J).

251 See, eg, ibid 154 [332], 156 [340] (Mansfield J).

252 Ibid 156 [339] (Mansfield J).

253 *Narrier* [2016] FCA 1519, [892]–[894].

254 Ibid [893].

statements on point by Dowsett and Jagot JJ in the *Pilki Appeal* over those of Barker J[255] and sitting more easily with the tenor of North J's original judgments.

Consistently with the analysis above, in commentary on *Pilki* and *Birriliburu*, McCabe emphasised several lessons for future claimants of *Akiba*-style rights.[256] He noted that in the absence of significant 'activity' evidence, the evidence of relevant 'traditional laws and customs' will need to be strong.[257] In this regard, the depth of witnesses' general cultural knowledge will be important (the strength of evidence from these less impacted communities was noted in these cases),[258] and any State concessions about continuity will potentially also be significant. It was also emphasised that the interpretation and context provided by expert evidence (for the pivotal cultural evidence) will be particularly important; the quality and importance of the anthropological evidence particularly in *Pilki* (about the nature of authority over lands and the history of trade across Australia) was highlighted by the courts.[259]

These points are well made, but it might be added at this juncture that given the emergence of a new respect for the original dominion underlying native title (replacing the scepticism of past approaches), the advances in these cases should perhaps not be so difficult to take to other claims. There is less room now to suppose that a particular community, under its traditional laws and customs, enjoyed a lesser custodianship over its lands or waters[260] – at least where the only reason for so concluding is a weakness in contemporary evidence born of more significant or more prolonged western impact. *Akiba* may yet prove to be more of a tipping point then we realise.

B Implications for Proof of Continuity/Connection?

The most significant challenge for many communities is the distinct task of establishing continuity – of connection, normative system, society, traditional laws and customs, or some combination of these (depending on the focus of argument and analysis). The state 'concessions' alluded to above will often not be made, and there is no argument to be had about the niceties of native title content for a community declared to have been 'washed away' by the 'tide of history'.[261] As noted above the tighter Australian thinking, with its exacting focus on specific 'traditional laws and customs', crystallised somewhat in the context of 'continuity' requirements in the High Court's *Yorta Yorta* decision of 2002 – principally through the Court's emphasis on survival of 'system' and 'society' (and apparent interpretation of those concepts). Perhaps the most difficult question in the wake of *Akiba* is whether the renaissance in Australian thinking holds some significance for this much maligned 'continuity' inquiry.

Once again it is important to note that there have long been glimpses of broader thinking on continuity. Some of this came in the form of rights/exercise type distinctions. In *Yorta Yorta* itself, on the issue of 'interruption', it was at least noted in the leading judgment that the non-

255 Ibid [892]–[893].

256 McCabe, '*Pilki* and *Birriliburu*' (n 134) 69–72.

257 Ibid 70–1.

258 See ibid.

259 See, eg, *Pilki* [2014] FCA 714, [117] (North J); McCabe, '*Pilki* and *Birriliburu*' (n 134) 70–1.

260 See further McCabe, '*Pilki* and *Birriliburu*' (n 134) 72.

261 See *Mabo* (1992) 175 CLR 1, 59–60 (Brennan J); and perhaps most prominently, *Members of Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606, [129] (Olney J).

exercise of rights and interests did not necessarily answer the relevant statutory questions – which are directed to 'possession' of rights and interests and the existence of a 'connection'.[262] Gaudron and Kirby JJ, in confirming the sufficiency of a 'spiritual connection' in their dissenting judgment, emphasised the requirements of 'possession' of rights and interests (rather than their exercise) and 'connection' (rather than traditional connection or the specifics of utilisation and occupation).[263]

Signs of broader thinking on continuity also came in other forms, particularly in the lower courts where these issues emerged earlier. Examples are found in periodic emphasis on the need only for a mere spiritual connection, in various returns to Brennan J's own ameliorating terminology on these issues,[264] in occasional more selective and discerning approaches to continuity and connection inquiries, in calls for evidential flexibility, and of course in actual attempted accommodation of specific change or interruption.[265] The most prominent early opposition to the strict thinking came in Black CJ's dissent in the first appeal upholding the *Yorta Yorta* trial defeat.[266] His Honour was insistent upon the need to accommodate change,[267] and preferred a liberal interpretation of the concept of 'tradition' in the statutory criteria – arguing that it was wrong to see 'traditional' as a concept concerned with what is 'dead, frozen or otherwise incapable of change'.[268]

In the High Court, Kirby J's similar emphasis on the need to accommodate change, in his dissent on content in *Ward*, also had implications for proof.[269] However, Gaudron and Kirby JJ addressed the matter of proof more directly in their *Yorta Yorta* dissent. Their Honours preferred a more flexible, variable and self-identifying notion of 'society' (or 'community') than the *Yorta Yorta* majority judges.[270] Moreover, they argued that on the ordinary meaning of 'traditional' ('handed down from generation to generation'),[271] and particularly in light of the impact of European settlement, laws and customs may properly be described as 'traditional' under section 223(1) notwithstanding that they do not correspond exactly with pre-settlement versions.[272] Their Honours suggested, then, that to be 'traditional', laws and customs should

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262 (2002) 214 CLR 422, 455 [84] (Gleeson CJ, Gummow and Hayne JJ).

263 Ibid 461, 465 [121], 466 [123]–[125]. Note also that Lee J in *Ward v Western Australia* (1998) 159 ALR 483 had noted that '[the] manner of exercise of activities connecting community members with the land is not of supervening importance. The question … is whether the links with forebears are relied upon…': at 539.

264 See above n 73.

265 See, eg, *Mason v Tritton* (1994) 34 NSWLR 572, 584 (Kirby P), 601 (Priestley JA); *Derschaw v Sutton* (1997) 17 WAR 419, 423–5 (Franklyn J); *Commonwealth v Yarmirr* (1999) 101 FCR 171, 249, 254, 255–6, 258–9 (Merkel J); *Wilkes v Johnsen* (1999) 21 WAR 269, 286 [76] (Wheeler J); *Ward v Western Australia* (1998) 159 ALR 483, 501–2, 514–6, 535–6, 539–41 (Lee J); *Western Australia v Ward* (2000) 99 FCR 316, 378 [229]–[231], 381–7 [239]–[263], 421 [395] (Beaumont and von Doussa JJ); *Rubibi Community v Western Australia* (2001) 112 FCR 409, 441–2 (Merkel J); *Yarmirr* (2001) 208 CLR 1, 131–4 [295]–[300], [307]–[351] (Kirby J); *Members of Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244, 259–66 [50]–[72] (Black CJ), 293 [194]–[196] (Branson and Katz JJ).

266 *Members of Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244.

267 Ibid 254–5.

268 Ibid 256.

269 *Ward* (2002) 213 CLR 1, 244–5 [574]–[575].

270 (2002) 214 CLR 422, 464–5 [116]–[119].

271 Ibid 463 [112], 463–4 [114].

272 Ibid 464 [115].

have their 'origins' in the past and differences should constitute 'adaptations, alterations, modifications or extensions made in accordance with the shared values or the customs and practices of the people who acknowledge and observe those laws and customs'.[273] Interestingly, the leading majority judgment in *Yorta Yorta* touched upon similar logic – namely the possibility that alteration, 'development' and/or interruption in traditional law and custom might be accommodated where it was contemplated by the traditional law and custom.[274]

After *Yorta Yorta*, some succeeding lower cases embraced the re-rationalised stricter approach.[275] Yet once again, others continued to search for flexibility even within the tightened parameters. Despite the enticing threads of dissent left in *Yorta Yorta* itself, or perhaps because of their appearance in dissents, efforts to liberalise the continuity tests remained somewhat haphazard. There were attempts to apply a more holistic 'connection' requirement,[276] and emphasis (again) on the sufficiency of spiritual connection[277] and continuity in knowledge[278] (as distinct from lifestyle and practices). There were efforts to find the survival of a 'society' in the continuance of 'some' traditional laws and customs (in lieu of a broad and general search).[279] There were instances of a more deliberately 'compartmental' approach to proof – ie, requiring only continuity in the laws and customs *underpinning* the surviving native title rights.[280] There was also some rejection of any strict search for uniformity (in observance and

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273 Ibid 464 [114]. Cf *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244, 278 [122] (Branson and Katz JJ).

274 (2002) 214 CLR 422, 443 [44] (Gleeson CJ, Gummow and Hayne JJ), albeit possibly only in the context of transmission of interests: at 490 [179] (Callinan J). Cf *Wik* (1996) 187 CLR 1, 20–1, 60 (SL Doyle SC) (during argument).

275 See, eg, *Daniel v Western Australia* [2003] FCA 666; *Risk v Northern Territory* [2006] FCA 404, [673], [677], [678], [700]–[725], 821]–[837] (Mansfield J); see also *Risk v Northern Territory* (2007) 240 ALR 75, 101–2 [105]–[107] (The Court). See also on proof: *Bodney v Bennell* (2008) 167 FCR 84, 102–15 [70]–[124], 131–3 [181]–[190] (The Court) ('*Bodney*').

276 See, eg, *De Rose* (2003) 133 FCR 325, 348–9 [74]–[75], 411–12 [285], 415–17 [305]–[313] (The Court); *De Rose v South Australia [No 2]* (2005) 145 FCR 290, 302 [45], 305 [58], [109]–[113] (The Court) ('*De Rose 2*'); *Sampi v Western Australia* [2005] FCA 777, [1075]–[1079] (French J); *Rubibi Community v Western Australia [No 5]* [2005] FCA 1025, [376] (Merkel J); *Rubibi Community v Western Australia [No 6]* (2006) 226 ALR 676, 699 [95] (Merkel J); *Northern Territory v Alyawarr* (2005) 145 FCR 442, 469–70 [88]–[93] (The Court); *Neowarra v Western Australia* [2003] FCA 1402, [350] (Sundberg J); *Harrington-Smith v Western Australia [No 9]* (2007) 238 ALR 1, 266 [1880] (Lindgren J) ('*Harrington-Smith*'); *Bennell v Western Australia* (2006) 153 FCR 120 (but note *Bodney* (2008) 167 FCR 84).

277 See, eg, *De Rose* (2003) 133 FCR 325, 418–21 [316]–[329] (The Court); cf *Griffiths v Northern Territory* (2006) 165 FCR 300, 359 [645] (Weinberg J).

278 See, eg, *Lardil Peoples v Queensland* [2004] FCA 298, [199]–[202], [207]–[210] (Cooper J), cf [212]–[226] (Cooper J); *Neowarra v Western Australia* [2003] FCA 1402, [291], [350], [353], [372]–[474] (Sundberg J). Cf *Gumana v Northern Territory* (2005) 141 FCR 457, 519–20 [229]–[230] (Selway J); *Rubibi Community v Western Australia [No 5]* [2005] FCA 1025, [141]–[148] (Merkel J); *Sampi v Western Australia* [2005] FCA 777, [718], [746], [862], [867], [1079] (French J); *Rubibi Community v Western Australia [No 6]* (2006) 226 ALR 676, 695 [79] (Merkel J); *Northern Territory v Alyawarr* (2005) 145 FCR 442, 469–470 [92] (The Court). Contrast *Harrington-Smith* (2007) 238 ALR 1, 97 [328], 185 [936] (Lindgren J).

279 *Bennell v Western Australia* (2006) 153 FCR 120, 317 [776], 319 [791] (Wilcox J) (but note *Bodney* (2008) 167 FCR 84, 102–15 [70]–[124] (The Court)). Cf *Harrington-Smith* (2007) 238 ALR 1, 190 [962]–[967] (Lindgren J).

280 See especially *Bennell v Western Australia* (2006) 153 FCR 120, 321 [800] (Wilcox J) (but note *Bodney* (2008) 167 FCR 84, 102–15 [70]–[124] (The Court)).

acknowledgement);[281] acknowledgement of outside interference and modern impracticalities;[282] and (of course) attempts at positive accommodation of actual change.[283] There was a conspicuous pull back on these various efforts in the Full Federal Court appeal in *Bennell*,[284] which perhaps only served to highlight the strains and significance of the *Yorta Yorta* approach – at least to commentators and judges writing extra-judicially.[285]

C Extending the Logic of *Akiba*'s Correction

As explored earlier the significant advance in *Akiba*, a determined distinction between 'underlying rights' and their 'exercise', emerged from extinguishment debates and has begun to impact upon native title content (and upon the means of establishing rights). Whilst connection issues were largely conceded in *Akiba* itself, owing particularly to previous determinations in the region,[286] a critical question now is whether the *Akiba* logic might usher in progress on the 'torturous' continuity test. At this point it is relevant to note that not only did the tightening emphasis on 'systems', 'society' and their survival in *Yorta Yorta* (with attendant particularity) seem to immediately narrow the entryway, it also risked some detachment of continuity inquiries from any broadening thinking on content. The substitution of the 'intersection of systems' focus (for the original 'burden on sovereign title' idea which became less useful around the time of the *Yarmirr* offshore litigation) meant that rather than reflecting on what might sustain more broadly defined rights (as they emerge), the law could allow itself to remain tangled up in the fine details of specific community laws and customs.[287]

Perhaps in part for this reason, judges appear to have contented themselves recently with continued pursuit of the splayed lines of liberality referred to above, and the 'continuity' tests seem not to have yet been meaningfully impacted by the significant conceptual evolutions

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281 See, eg, *Neowarra v Western Australia* [2003] FCA 1402, [176]–[177], [184], [191], [210], [222], [228], [243], [249], [260], [269], [271], [299], [310], [339], [344]–[346] (Sundberg J). Cf *Jango v Northern Territory* (2006) 152 FCR 150, 253–4 [364] (Sackville J). But see *Jango v Northern Territory* (2006) 152 FCR 150, 265– 6 [405], 276 [449] (Sackville J); *Risk v Northern Territory* [2006] FCA 404, [624] (Mansfield J). But see *Risk v Northern Territory* [2006] FCA 404, [793] (Mansfield J); *Harrington-Smith* (2007) 238 ALR 1, 51 [100] (Lindgren J). But see *Harrington-Smith* (2007) 238 ALR 1, 52–3 [110], 189–190 [956]–[961] (Lindgren J); *Bennell v Western Australia* (2006) 153 FCR 120, 266 [601], 312–15 [753]–[764], 317 [779], 319 [787] (Wilcox J).

282 See, eg, *Neowarra v Western Australia* [2003] FCA 1402, [249], [309]–[310], [319], [321]–[322], [350]–[353], [373]–[374], [764] (Sundberg J). See also *De Rose* (2003) 133 FCR 325, 419–20 [321]–[325] (The Court); *De Rose 2* (2005) 145 FCR 290, 320 [101] (The Court); *Rubibi Community v Western Australia [No 5]* [2005] FCA 1025, [96], [147], [183], [241] (Merkel J); *Harrington-Smith* (2007) 238 ALR 1, 190 [967] (Lindgren J). And importantly, on the relevance of the 'reasons' for community change, see *Bennell v Western Australia* (2006) 153 FCR 120 (but see *Bodney* (2008) 167 FCR 84, 104–5 [81]–[82], 119–20 [96]–[98] (The Court)).

283 See, eg, *Neowarra v Western Australia* [2003] FCA 1402, [285], [310], [337]–[341], [764] (Sundberg J); *Sampi v Western Australia* [2005] FCA 777, [743] ff, [866], [1050] (French J); *Harrington-Smith* (2007) 238 ALR 1, 97 [332] (Lindgren J); *Rubibi Community v Western Australia [No 5]* [2005] FCA 1025, [25], [90], [109], [122], [131], [136], [368] (Merkel J); *Jango v Northern Territory* (2006) 152 FCR 150, 290 [504] (Sackville J); *Griffiths v Northern Territory* (2006) 165 FCR 300, 335 [501], 358 [638]–[639] (Weinberg J); *Bennell v Western Australia* (2006) 153 FCR 120, 307 [729], 312–13 [758], 316–17 [773]–[777], 318–19 [784]–[786] (Wilcox J).

284 *Bodney* (2008) 167 FCR 84.

285 Strelein, 'Reforming the Requirement of Proof' (n 78) 7.

286 See Brennan (n 6) 31–2.

287 See, eg, the discussion (now rightly acknowledged to be somewhat peripheral) in *Murray* [2016] FCA 752, [527]–[608] (McKerracher J).

going on around them.[288] Some of the recent specific attempts at liberality have been significant – for example in *Croft v South Australia*,[289] *Narrier*,[290] and *Ashwin v Western Australia*.[291] Yet the *Yorta Yorta* test continues to be a heavy burden for many communities.[292] A number of these cases also highlight the disadvantages (noted earlier) of a particular and exacting process that tends to discourage aggregated or regional claims.[293]

Despite the apparent tenacity of the core *Yorta Yorta* thinking, the legal context for these inquiries has now changed. To put the point at its simplest, the 'traditional laws and customs' that have been broadened somewhat by the *Akiba* correction are logically the same 'traditional laws and customs' that underlie the test for continuity – whether manifested in requirements of 'connection', survival of 'system' or 'society', or simply continued acknowledgement and observance. More broadly speaking, the logic underlying the *Akiba* correction is that segmentation and specificity (particularly if driven by western legal and economic distinctions) is not properly reflective of the First Peoples' relationships with land and waters, or the resilience of those relationships. Accordingly, it would seem inescapable that the new thinking should also have some effect on continuity inquiries.

If we are seeking broader 'underlying rights' (looking past the detail and fate of particular 'exercises'), and therefore examining and interpreting 'traditional laws and customs' at a higher level of abstraction, we are retreating from the particularity of the Australian legal history. From the close vantage point of old approaches we saw interference, interruption and change everywhere; the former two were translated too often into extinguishment or expiry, and the latter was often viewed as culturally disingenuous or even a threatened resurgence of the

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288 For some limited early signs, see, eg, *Wyman v Queensland* (2015) 235 FCR 464, 500–1 [188] (The Court) ('*Wyman*'); *Murray* [2016] FCA 752, [442] (McKerracher J).

289 (2015) 325 ALR 213, 255–6 [225], 318 [616], 319 [621], 323–4 [644]–[645] (Mansfield J) (accommodation of change; attention to reasons for disruption; selective inquiry).

290 [2016] FCA 1519, [31], [311]–[312], [389]–[400], [822]–[848], [864]–[868] (Mortimer J) (accommodation of change; flexibility in approach to different regions; evidential flexibility; selective inquiry; assessment at the level of the group as a whole).

291 [2019] FCA 308, [263]–[277], [432]–[450] (Bromberg J) (selective focus on relevant laws and customs ie, those relating to the acquisition, transmission and exercise of rights and interests); and continuity assessed at the level of the group). See also *Wyman* (2015) 235 FCR 464, 497–500 [167]–[181] (The Court) (moderation in the survival of 'society' and 'system' inquiries; selective inquiry; and de-emphasis on actual exercise of rights and interests). See also *Warrie* (2017) 365 ALR 624, 661–6 [120]–[140] (Rares J) (holistic approach to connection; adaptive nature of 'societies' acknowledged and positive accommodation of change; *acknowledgment of external influence)*. See, eg, *Murray* [2016] FCA 752, [61], [284], [347], [638] (McKerracher J) (accommodation of change and selectivity in the inquiry; de-emphasis on the need for physical presence); *CG (dec'd) v Western Australia* [2015] FCA 204, [458]–[492] (Barker J) (selectivity in the inquiry).

292 See, eg, *Wyman* (2015) 235 FCR 464, 525–8 [286]–[301] (The Court) (discontinuance of the traditional normative system and loss of traditional laws and customs despite remaining knowledge and awareness of traditional matters by some persons); *CG (dec'd) v Western Australia* [2015] FCA 204 (failures across various aspects of the continuity requirements); *Sandy (Yugara People) v Queensland* (2017) 254 FCR 107 (loss of continuity of connection); *Starkey v South Australia* [2018] FCAFC 36 (claimed rights and interests held to be contemporary rather than traditional and groups had not established a continual substantially uninterrupted connection under traditional laws and customs).

293 In *Starkey v South Australia* [2018] FCAFC 36, the trial judge acknowledged that their conclusions were 'counter-intuitive' given the likely position at sovereignty, but found it not possible to prioritise one claim over the others – and the fact of contemporary competition was seen to be evidence of a lack of continuity. See also the difficulties encountered in *Ashwin v Western Australia* [2019] FCA 308, and note the comments in *Wyman* (2015) 235 FCR 464, 526 [290] (The Court).

'system' supposedly nullified at the point of sovereignty. Yet a higher vantage point refocusses attention on the deeper-set, less fragile, less stylised and less transient features of the First Peoples' relationships with lands and waters. Accordingly, there is inherent room for specific changes, interruptions and interferences – and they logically become less relevant to any assessment of the survival of the interest.[294]

Most directly, the evolution of thinking on content has clear implications here. Under the less exacting framework, now reflected in key lower court decisions and the wording of more progressive recent determinations,[295] the broadly identified rights are inherently more adaptive. So too are the more readily recognised 'exclusive possession' titles (now often approximating or approaching a comprehensive interest), and the frequency of these should only increase with the higher bar set for past extinguishment. In these contexts, most particularly post-*Akiba*, changes or interruptions to the specifics of lifestyle, access, nature and purpose of use, location and manner of use, and/or inter se organisation and entitlement (which may previously have been fashioned into evidence of discontinuity), are now logically more incidental. Conversely, more practices and contemporary variations are positive evidence of continued enjoyment of the broadly cast underlying rights, and of continued acknowledgement and observance of the attendant 'traditional laws and customs'. Some of these supporting practices and purposes might not yet even have been conceived of – certainly not by the western jurisprudence. It should also be noted here that such broadening of inquiry can only encourage more aggregated, possibly regional claims.[296]

In concrete terms, using the *Akiba* example, evidence of continuity in the 'traditional laws and customs' (and connection) supporting a broad right to take resources for any purpose might logically look different to that sought in respect of a right to take for limited purposes a particular species at a particular location (such is the detail to which past cases have sometimes descended).[297] Moreover, the reasoning that in a particular case asserted rights and interests are 'contemporary' rather than traditional[298] will now be, both with regards to content and continuity, less apposite. Indeed, the contemporary community practices that have been dismissed as 'revivalism' in past cases, including the trial decision in *Yorta Yorta*,[299] might now require more careful thought. Also, any dismissal of remnant or inconsistent specific knowledge[300] might similarly need to be reconsidered as we turn the focus to the broader underpinnings of that specific and inherently fragile detail. This broadened thinking can apply, of course, not only to contemporary continuity – but also to the 'chain' of continuity that we are told is required to reach back across the generations.

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294 Cf the approach of Wilcox J in *Bennell v Western Australia* (2006) 153 FCR 120.

295 See the earlier analysis of post-*Akiba* decisions and 2018 determinations at Part IV(B).

296 Regional claims and negotiations appear to be both encouraging, and encouraged by, the broader Australian thinking – which offers inquires at a broader level of abstraction and hence might facilitate the finding of more commonalities. Broader claims obviously can reduce the evidential, economic, legal and social strains on communities. See discussion of three significant broader claims (in the south-west, Cape York and Torres Strait) in Keon-Cohen (n 129) 24–6.

297 See, eg, *Yarmirr v Northern Territory* (1998) 82 FCR 533; *Daniel v Western Australia* [2003] FCA 666.

298 See, eg, *Starkey v South Australia* [2018] FCAFC 36 (noted above at n 292).

299 *Members of Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606.

300 See, eg, *Wyman* (2015) 235 FCR 464 (noted above at n 292).

The *Griffiths* compensation decision shores up the broadening thinking on native title content (as discussed earlier), and hence the extrapolated implications for continuity (argued above). In particular, the High Court's postulation in non-economic loss calculations of a freehold equivalent valuation for an exclusive interest supports a broader contemporary conceptualisation of the nature and depth of the native title interest.[301] As noted above, the Court's reduction of the award for economic loss on the facts (alongside its upholding of the significant cultural loss award) might seem to shift emphasis back from broader economic value to unique, non-economic and spiritual significance.[302] Yet it is important to remember that the Court was ultimately considering the itemised list of non-exclusive and non-commercial rights presented to it[303] – and a community with strong and relatively untrammelled traditional connections. The conclusion that only 'simple interest' was payable (on the economic loss), and particularly the degree of focus in this litigation upon the strength and purity of extant cultural and spiritual connections (in the consideration of non-economic loss),[304] will inevitably be debated as the implications of the High Court decision are explored.[305] The risk, perhaps, is something of a 'second coming' for the *Yorta Yorta* mindset. Whilst the impact might be offset this time by greater *economic* loss assessments in more densely settled regions, it is hoped that there might be a clearer legal acknowledgment now that loss of 'connection' is not confined to remote communities.

Working back now to the recent extinguishment cases – ironically the source of the current renaissance in Australian thinking – they have told us that significant regulation of activities relating to a particular resource (*Akiba*, *Karpany*), or suppression of all activity in particular locations (*Brown*), even broadly drawn (*Congoo*), are now less likely to effect extinguishment of any underlying rights. Logically non-extinguishment might not conclusively establish survival of connection (to invert the logic applied in *Fejo*), however these cases collectively do indicate that we are now looking to broader and deeper entitlements as the source and essence of native title. They thereby build in greater resilience, and adaptive and regenerative capacity, in the face of significant interference or interruption (even with lasting impacts) – and implicitly support a broader approach to requisite continuity. More specifically, these cases further de-emphasise physical presence and specific practices (including in situations of significant suppression), and cast some doubt on the appropriateness of any geographic particularity in continuity and connection inquiries.[306] Moreover, these cases might seem to

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301 See also ibid 237–8 [96]–[97] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) (including reference to the 'rights' v 'exercise' distinction and the need for a 'highest and best use' valuation).

302 Ibid 255 [153] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

303 Ibid 214–15 [10] Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). Cf ibid 229 [69]–[70], 240 [106] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

304 See, eg, ibid 238 [98], 257 [166], 269–270 [217] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). Cf ibid 256–7 [163], 268 [230] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

305 For an early comment on the issue of interest, and the historical and contemporary legal context for the decision, see Eddie Cubillo, 'An Indigenous View on the Timber Creek Decision: The Trauma That Is Native Title' (Article, 24 March 2019) <https://www.linkedin.com/pulse/indigenous-view-timber-creek-decision-trauma-native-cubillo-eddie>.

306 Cf the different approaches apparent in *Bennell v Western Australia* (2006) 153 FCR 120 and *Bodney* (2008) 167 FCR 84. And recently see, eg, *Warrie* (2017) 365 ALR 624, 643 [41], 661–3 [120]–[124] (Rares J).

add further to the difficulty of maintaining the position that the 'reasons' for interruption or change are irrelevant to its legal significance.[307]

Perhaps the central question underlying these issues is whether we can and should now properly reconnect 'continuity' inquiries to the remainder of the doctrine. As noted above, the 'survival of systems' focus appeared to permit and encourage some disconnection – and hence some calcification of the continuity methodology despite the surrounding progress. Given the nature of the conceptual evolution in recent years, it is difficult to see how the doctrine can remain committed to specifics when considering continuity of 'connection' or 'acknowledgement and observance'. The rights are more broadly conceived, proof of those broader rights does not require evidence of specific exercises, and extinguishment is to be adjudged by reference to the broader and more resilient nature of these rights. Does the requirement of continuity somehow provide a last safe refuge for the old thinking? As emphasised above, the requirement of sustained 'acknowledgment and observance' deals in the same 'laws and customs' that have been broadened for other purposes, and the connection sought is one 'by those laws and customs'.[308] However, semantics aside, on the issue of 'connection', the recent jurisprudence has effectively revealed *more of* the connection with lands and waters – by refocusing on the underlying rights and tenets of the Indigenous relationship with lands and waters. 'Connection' is now itself more adaptive and resilient, and it would seem more readily evidenced by a broader range of contemporary priorities and undertakings.

It might similarly be said that more of the 'system' and 'society' – and their adaptability and resilience – has also been revealed. If the interposed emphasis on 'system' and 'society' in *Yorta Yorta* is itself now the source of particularity, then the logic of that methodology should be revisited. Apart from the fact that all of these continuity inquiries were built around the same (now broadening) 'traditional laws and customs', where a community has established a broad subsisting right under relevant subsisting traditional laws and customs, is an additional detached and more exacting inquiry into their 'system' or 'society' needed to sustain that right? That would seem to be unduly onerous and intrusive – at the very least for a remnant title where the 'loss of control' has been accepted. If the more exacting inquiry is considered to be somehow required by the group or communal nature of interest, then we appear to be accidentally fashioning a jurisprudence for 'self-government' claims long before recognising that possibility – and with some unexplained rigid preference for historical organisational structures over contemporary integrated frameworks.[309]

Obviously, some of this broader thinking was evident or implicit (in various forms) in the earlier opposition to the strict Australian approach to continuity (explored above). Now, this thinking has a lever, and a considerable prospective importance. These arguments also lead us, however, to the most difficult of the issues canvassed in this article. What of the communities

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307 See, eg, *Bodney* (2008) 167 FCR 84; see also *Sandy (Yugara People) v Queensland* (2017) 254 FCR 107, 149–50 [221] (The Court).

308 See especially *Native Title Act 1993* (Cth) s 223; *Ward* (2002) 213 CLR 1, 66 [18] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), quoted in *Griffiths* (2019) 364 ALR 208, 219 [24] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

309 Interestingly, and very recently, the High Court in *Griffiths* noted (without further comment or concern) that there had been 'no dispute' that the apportionment or distribution of the compensation award as between members was an 'intramural matter': *Griffiths* (2019) 364 ALR 208, 255 [156] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

that have already been tried and stopped on the *Yorta Yorta* test? Some have navigated around and beyond the 'obstacle' that native title had become for them – by reason of the converging challenges of 'continuity' and vast historic (non-compensable) extinguishment in more settled areas – most prominently the Noongar nation in the south-west of the country.[310] The largely positive and broad-thinking role played by the State of Western Australia in that settlement, and correlatively by the Victorian government in the establishment of the *Traditional Owner Settlement Act 2010* (Vic), stand out as the best responses to the difficulties of a deeply problematic threshold 'continuity' test and the weight of historic extinguishment in earlier settled and more impacted regions of the country.

VII CONCLUSION

As noted at the outset of this article, as we move beyond the 25th anniversary of the *Mabo* decision there is a growing chorus of concern that in the exacting detail of our native title law we have strayed too far from the logic, sanctity and opportunity of 'ownership'. The resulting legal burdens, the dismantling of economic potential, and the associated intrusion, division and differentiation has weighed heavily on many communities. Moreover, this restrictive approach has regrettably allowed some of the self-serving legal blindness of past times to stow away in what was to be the flagship of Australian 'decolonisation'.

We have at various times blamed, for the difficulties, the terms of the *Native Title Act*, the adversarialism of court process, the overzealous explication of community histories, and the mindsets of government respondents. Yet close examination reveals that the tightening of approach was to some extent an accident of the Australian legal history. Viewed in this light, and in light of the steady accumulation of dissenting voices, the *Akiba* correction was no second 'judicial revolution'[311] – it was a natural and inevitable evolution, and a profoundly important one.

The *Akiba* case recovered a fuller respect for the holistic relationships and dominion that underlay First Peoples' original custodianship of land and waters. While a number of dissenting and lower court judges had previously attempted to draw this out of the Australian constrictions, *Akiba*'s critical correction found traction. The clear and simple distinction between 'underlying rights' and 'exercises' of them held many attractions for the beleaguered Australian jurisprudence. The courts had long struggled to find a principled accommodation of 'change' in native title law, despite a long history of rhetorical acknowledgement.[312] The *Akiba* distinction achieves just that – through its de-focusing of inquiries. Considerable change is naturally accommodated – but with some definitional control left in the hands of the courts and the vexed issues of post-sovereignty accrual of new rights (and the possible reanimation of the Indigenous legal system) neatly left to one side. The 'traditional laws and customs' methodology is left fully intact (even the strict dating of that notion in *Yorta Yorta*), and the edicts of *Ward* about the error of drawing assumptions from ideas of 'ownership' is avoided, by a simple anchoring of the 'underlying rights' in broader traditional laws and customs. And while the 'assumptions' of ownership (so well established in the comparative jurisprudence)

310 See, eg, Glen Kelly and Stuart Bradfield, 'Winning Native Title, or Winning out of Native Title?: The Noongar Native Title Settlement' (2012) 8(2) *Indigenous Law Bulletin* 14.

311 See earlier, as regards the *Mabo* decision: MA Stephenson and Suri Ratnapala (eds), *Mabo: A Judicial Revolution* (University of Queensland Press, 1993) xv–xvii.

312 For broader comparative analysis, see Young (n 63).

do continue to seep into the Australian conception of exclusive native title, *Akiba* gives us the critical tool to begin dismantling the piñata theory of partial extinguishment that has so pervaded the many determinations of *non-exclusive* native title. Incidentally, the new resilience that the *Akiba* distinction has helped afford to native title, in the face of quite significant suppression, may well result in a new resilience for the original exclusivity of that title. As noted earlier in this article, the threads of broader thinking are converging on a more principled Australian approach.

There is considerable irony in the fact that the *Akiba* correction came from the stable of High Court extinguishment cases. As explored earlier, the initial strong focus on extinguishment in the formative cases was a significant contributor to the constrictions in the Australian doctrine. Most particularly, it encouraged (in various ways) over-specificity in the definition of the interest – to which proof of rights, and by association proof of continuity and connection, were somewhat beholden. Now the extinguishment jurisprudence is driving the correction – the proverbial tail is wagging the dog back the other way. Unfortunately, however, *Yorta Yorta*'s interposing of a focus on 'survival of system' in continuity inquiries tended to detach those inquiries from future progress on issues of definition and content. So, while the mood of dissent on content (and indeed proof of rights) quickly found a clear path forward in the *Akiba* logic, the principles of continuity have been somewhat left behind – and lower court judges left to continue a haphazard resistance.

This then is a critical issue in the wake of *Akiba*: does the renaissance in Australian thinking hold some significance for continuity inquiries, and hence some relevance for the communities burdened by the rigorous threshold standards laid down in *Yorta Yorta*? The argument in this article is that the *Akiba* logic *can* so extend – to questions of continuity (in their various forms). In this way, it can at the very least galvanise and organise the accumulating opposition to the strictness of *Yorta Yorta*, and indeed perhaps unlock new lines of thinking. Semantically, the 'traditional laws and customs' that have been broadened by *Akiba* are the same 'traditional laws and customs' that underlie the test for continuity in its various manifestations. More broadly, *Akiba* rejects any insistence on segmentation and specificity as being not properly reflective of the First Peoples' relationships with land and waters (and the resilience of those relationships) – and this thinking should logically also have some effect on continuity inquiries. *Akiba* refocuses attention on the broader and deeper-set features of these relationships. Accordingly, there is inherently more room for changes, interruptions and interferences (and they logically become less relevant to the survival of the interest). Correlatively, more contemporary variations are positive evidence of continued enjoyment of the broadly cast underlying rights and of continuity in acknowledgement and observance of the relevant traditional laws and customs. Moreover, the particularity of old should not be given safe harbour in notions of 'connection', 'system' or 'society'; the recent jurisprudence has effectively revealed *more* of the connection (and a broader connection) with lands and waters, and *more* of the 'system' and 'society' (and their adaptability and resilience). The law might now be better equipped to recognise that 'connection' to land and waters is not confined to remote and little-impacted First Peoples.

A more intractable difficulty canvassed in this article resides in the fact that the ink has long dried on many determinations. The survey above of determinations from 2018 to early 2019, while illustrating some post-*Akiba* expansion of thinking, also reveals very clearly the consistency and tenacity of the old approaches and the potential pre-*Akiba* 'deficit' we are now left with. Some of the potential limitations in the terms of these determinations might simply be reinterpreted post-*Akiba* – the *Akiba* correction might dismantle both piñatas and some

Trojan horses. Yet the highly detailed itemisation of permissible activities in many non-exclusive determinations, and the express general exclusion of commercial activities in many exclusive and non-exclusive determinations, are more difficult to work around. These are important matters, warranting careful consideration and review, and ultimately it might seem some supplementary consultation and negotiation. Apart from the unnecessary potential for future disputation, the relative strength of a community's native title rights (surviving or recently interfered with) can be critically important in future negotiations and/or compensation claims.

An even more intractable difficulty, if that is possible, lies in the fact that many communities have already been tested and turned away from native title processes by reason of the *Yorta Yorta* restrictions. Which claims might have been shored up by the broader thinking, carried logically across from *Akiba*, is a question we do not wish to litigate. It would seem that the time is here for some closer national attention to the initiatives in the south west of the country (the Noongar settlement) and the Victorian regime established under the *Traditional Owner Settlement Act 2010* (Vic). In considering these difficult questions, and the issue of existing determinations, it must be remembered that the brighter path ahead has been built on the labour and loss of those that came before.