LAND LAW

Semester 2, 2014

Contents:

INTRODUCTION

Class 2 – Introduction and Crown Grants:

Housekeeping Matters:

- Lecturer – Brendan Edgeworth b.edgeworth@unsw.edu.au
- Class Participation based on other marks… Only counts if more than other marks
- Research Assignment → Specific topic (need to be researched)
- Exam → Problem question based on legal rules

The Doctrine of Tenure:

- **Allodial** = Absolute ownership of rights
- **Tenurial** (tenant) – Limited rights over the land… Right to exclusive possession for the time being → Hold rather than own the land
    - All interests in land were limited under the doctrine of tenure as the Crown was believed to be the owner of all land
    - Crown is the initial owner of all land then they give it out to others
- Tenure refers to a mode of holding land whereby one person (the tenant) holds land from (or 'of') another subject to the performance of certain obligations
- Everyone below the Crown had limited rights as rights to land were subject to obligations to the party immediately above them
    - Pyramid of ownership was existent → Crown at the top, followed by the tenant in chief etc.
- Originated with the King where land was in return for a service or incident
    - **Services** – Obligation on the part of the tenant owner to the landlord (**eg:** Agree to give knights to serve the king in exchange for a land grant, *socage* tenure whereby agriculture labour was owed by tenant to their lord)
        - Socage (Quit rent) was the only service ever used in Australia
    - **Incidents** – Rights conferred on the lord over the tenant's land or the tenant's person that arose in certain circumstances (**eg:** Heir of a tenant paying money to succeed over the land after death of owner, *escheat* whereby the land goes back to the Crown if someone dies intestate)
- The doctrine of tenure has no practical significance in Australian land law however its influence still lingers as it is often said that all land is still owned by the Crown
    - The modern landlord-tenant relationship also mirrors tenurial relationships
    - The traditional doctrine of tenure operated until *Mabo*, to obstruct recognition of native title

The Doctrine of Estates:

- 'Estate' = The fullest set of rights of enjoyment of the land → The right of possession
    - Estate in fee – The maximum interest which a subject could have in the land
    - Estate indicates exclusive possession of land
- The doctrine of estates permitted interests in land to be carved out on a temporal basis… Ownership of the estate entitles the owner to possession (*seisin*)
- The greatest estate was the fee simple which in theory could last forever
    - A life estate entitle the holder to possession of the land for his lifetime

The Estates – General

- Critical distinction is between <u>freehold</u> and <u>leasehold</u> estates. Is also possible to have security interest in land (**eg:** mortgage) giving a deferred right to an estate
    - **Freehold** – Fee simple, fee tail, life estates
    - **Leasehold** – Are distinguished from freehold estates on the basis that their duration is certain or capable of being rendered certain

<u>Fee Simple:</u>

- The fee simple is the greatest interest in land recognised by the common law and is the closest it comes to recognising absolute ownership
    - A fee simple confers the lawful right to exercise over upon, and in respect to, the land all rights of ownership (*Gumana v Northern Territory* 2007 FCR)
- Affords the 'widest powers of enjoyment in respect of all the advantages to be derived from the land itself and anything found on it' (*Wik v Queensland* 1996 CLR)
- Estate continues indefinitely regardless of the existence of heirs
    - Fee simple's can also be freely disposed of by will
- 'Simple' means unlimited in time + rights

<u>Fee Tail:</u>

- An estate in fee tail was given to a person and specified descendants of that person, with the intention that it should last only while this line of specified descendants continued (**EG:** Land to A and the heirs of his body)
- In NSW fee tail estates have been virtually abolished (s 19 *Conveyancing Act 1919*)
- 'Tail' means limited in some way

<u>Life Estate:</u>

- A life estate was created when an interest in land was granted to a person for life
    - Not an estate of inheritance as it terminated on the death of the tenant
- Under statutory provisions estates *pur autre vie* (for the life of another) may be disposed of by will and, on an intestacy, form part of the assets of the deceased to be distributed among the next of kin

<u>Leasehold Estates:</u>

- The duration of a leasehold estate is certain or capable of being certain
- A lease for a fixed term of years – Automatically expires at the end of the period
- A periodic tenancy – Does not terminate until appropriate notice is given (eg: Monthly or weekly leases that continue until told otherwise)
- A tenancy at will – May be determined at any time by either party subject to a 'packing up' period… Arguably is not a lease as it is not for a certain period

- Tenancy at sufferance – Where a tenant takes a possession in land lawfully but continues wrongfully in possession after the expiration of the term without the landlord's assent or dissent
    - Landlord may institute proceedings for recovery of possession of land from the tenant but cannot pursue trespass as initial entry was lawful

Creation of freehold estates – Words of Limitation:

- The technical words used merely to define the estate conferred were known as words of limitation, while words which designated the person upon whom the estate was conferred were called words of purchase
- Designated forms of words must be used in order to create certain types of words
    - Fee Simple: 'to A and his heirs' were necessary for a fee simple inter vivos (by declaration) however no specific words necessary if done by will
    - Fee Tail: 'Heirs' and words indicating an intention to keep within the family was vital (no longer allowed in Australia)
    - Life Estate: 'to A for life' however is created by default if the words of limitation/creation are not sufficient for one of the other categories

Statutory Modifications to the Common Law:

- Statutory modifications have disposed the presumption in favour of a life estate and replaced it with the presumption that one intends to dispose of a whole interest
- NOTE: Words of limitation have only ever been relevant to old system land (registration under the Torrens system have removed this requirement)

Determinable and Conditional Interests:

General:

- The common law allowed limits to be imposed on the duration of an estate granted by the attachment of a 'condition subsequent' or by way of 'determinable limitation'
- If a condition subsequent is void the primary gift remains valid, but if a terminable limitation is void the gift fails entirely as it is intimately part of an estate
- **Conditional interests** – 'On condition that', 'but if', 'provided that' (still get gift)
- **Determinable interests** – 'Whilst', 'during, 'as long as', 'until' (all becomes void)

Effect of Void Contingencies:

***Zapletal v Wright* [1957] Tas SR 211, Supreme Court of Tasmania:**

- Zapletal and Wright (ex-husband and wife) were joint tenants to a property however the defendant (husband) agreed to put the name in both names despite no contributions being made to the property
    - Promise was made that if the wife left the husband she would take her name of the property documents… Claimed that a fee simple was subject to the condition that if she should leave the husband her interest should cease
    - Husband attempts to enforce the promise as a condition that attaches to the gift

- In certain circumstances the common law can provide limits on the conditions attached to a fee simple or land purchase
    - Court held that the condition was void as tending to promote immorality (substance of the obligation promoted immorality in leaving her husband)
- Held that the plaintiff (wife) took by way of gift as joint tenant in fee simple *free from the condition* which is void
- Conditions fail on the basis that they are: **(1)** Immoral and **(2)** They are determinable in the essence that the entire gift will fail if the condition is not followed
    - The specific words needed to create a determinable interest (eg: whilst, during etc.), If specific words are not used it is considered a conditional agreement which can be partially excluded
    - Key issue → Does the intervening act terminate the land grant? If yes, it is a determinable interest and consequently a grant is considered invalid
- NOTE: The immorality must be that which is proportionate to deny any claim (*Andrews v Parker* [1973] Qd R 93)

When will a condition be void?

- There are 5 grounds upon which conditions and limitation may be void for reasons of public policy
    - **(1)** Conductive to immoral behaviour (*Zapletal v Wright*)
        - Immorality is an ideal which changes/evolves over time therefore cannot be a condition to a transfer of property (*Andrews v Parker*)
    - **(2)** Illegality (such as ceasing and interest upon bankruptcy in order to prevent creditors from accessing property *Re Machu* 1882 21 Ch D)
    - **(3)** Void for uncertainty (such as 'Jewishness' in *Clayton v Ramsden* [1943])
    - **(4)** Undue restriction on the right to marry (*Trustees of Church Property of the Diocese of Newcastle v Ebbeck* (1960) 104 CLR 394 where a condition was attached requiring the marriage to involve another of Protestant faith)
        - Grants conditional on the grantee not remarrying have been upheld as valid as have prohibitions on marrying a member of a narrowly-defined group…
    - **(5)** Substantial restriction of a grantee's right to alienation

The Doctrine of Waste:

- The basic purpose of the common law doctrine of waste is to reconcile the conflicting interests of life tenant and remainderman
    - Allows a balance between the future interests in the property and the current rights to property
- There are a number of categories of waste:
    - **Ameliorating waste (Improvements)** – Conduct by the life tenant which alters the character of the land, but enhances its value
        - Court will provide no relief other than nominal damages to the remainderman… Injunction can be sought if it is envisaged that future acts may negatively impact the remainderman

    - **Permissive waste** – Committed where the life tenant fails to keep the property in a satisfactory state of repair
        - Tenant is <u>not liable</u> for permissive waste in the absence of a specific condition/obligation to keep the premises in a state of repair
    - **Voluntary waste** – Positive act occasioning
        - A life tenant <u>is liable</u> for voluntary waste unless the instrument granting the estate makes the life tenant 'unimpeachable for waste'
    - **Equitable waste** – Prevents life tenants who unconscionably exercise their rights (given in the instrument) to prejudice the remainderman
        - It is now provided by legislation (s 9 *Conveyancing Act 1919*) that an estate for life, without impeachment of waste, shall not confer upon the tenant for life any legal right to commit equitable waste unless an intention is present in the instrument
- Remedies for waste = Account of moneys wrongfully received, injunction relief to refrain the individual from further damage

Legal Future Interests:

- The doctrine of estates involves the recognition of future interests
    - Future interests occur where a will declares one as an owner after the death of another… If a present interest at the point when the interest is gained (upon death of the person predecessor who owns the land)

<u>Reversions and Remainders:</u>

- **Reversion** – Future right which becomes a present right upon the death of a life tenant (not valid until death)
- **Remainder** – Disposing of a future interest to a 3rd party
    - Those who are waiting for a future interest are 'remaindermen'

<u>Vested and Contingent Remainders:</u>

- A **vested interest** is one to which a person is presently entitled to possess, or one that is bound to take effect in possession at some future date
    - Requires a precise identification of the person who is to take the interest and there must be no condition precedent to the interest falling into possession
- A **contingent interest** may or may not take effect in possession because some contingency must be met before vesting occurs
    - A condition must be met in order to for the gift to be awarded
    - Where the identity of the gift taker is unknown the gift is contingent
        - EG: To A for life and then to the eldest surviving child (the identity of the eldest child is unkonown therefore will only become vested once A dies)

NSW Government Land and Property Information – Land Title Systems in NSW:

Crown Land:

- Crown land = The land of an acquired colony belongs to the reigning monarch, thus, Captain Arthur Phillip claimed all Australian land under the doctrine of terra nullius
- All land remains Crown land unless alienated by grant, sale or resumption

Old System Title:

- Old system land title is a matter of quality → The title is good, but only if a better one cannot be established
    - In order to establish land ownership the searcher must collect and examine an unbroken chain of documents from the original Crown grant up until now
- Old system land title is complicated, expensive, uncertain and is not guaranteed by the State

Torrens Title:

- Robert Torrens adapted the merchant shipping registration system into a simple method for land conveyancing in 1863
    - All land granted by the Crown has been subject to the provisions of the *Real Property Act 1862*
- The State maintains and guarantees the Torrens Title Register whereby individual land transactions are mandatorily lodged with LPI using standardised forms
    - Owner receives a single document called a Certificate of Title (CT) which supports their ownership
    - A Torrens title tells of the current state of ownership and lists any encumbrances affecting the land

NSW Government Land and Property Information – The 1st Crown Grants:

- Crown grants are normally issued subject to various exceptions, reservations and conditions and the title that develops from the grant will inherit these
- Typical exceptions have included:
    - Reservations of gold, silver and other minerals such as coal
    - Reservations to construct roads, bridges, canals or railways
    - Conditions regarding the blocking of certain monuments (**eg:** Lighthouse)
    - 100 feet reservation from the high water mark

- Once a citizen has a land title, (either a fee simple or lease), they are free to deal with the land as they please. They can use it for their own benefit or sell it (or make a gift of it) to another person. In other words, once a Crown grant has been made, the land is part of the open land market and can be used for citizens' economic and personal benefit. The Crown can only get freehold titles back, or leasehold titles back before the end of the lease, by 'compulsory acquisition', that is, through a formal legislative process, which requires the payment of money to citizens. Under s51(xxxi) of the Commonwealth Constitution, the Commonwealth government must pay 'just terms'

NATIVE TITLE

Class 3 – Native Title:

The Common law, Tenure and Native Title:

- Native title is that recognition space between the common law and the Aboriginal law which is now afforded recognition in particular circumstances
- Under the traditional doctrine of tenure issues arose for Aborigines as they were unable to trace their traditional title to the land and in turn land was afforded to the sovereign state (Must be able to trace land to a Crown grant as per *Attorney General v Brown* → Indigenous not able to therefore were initially refused any rights to land)
    - The states of WA and QLD (where most aborigines resided) were not supportive of any legislation which recognised native title, thus common law was relied upon (through the HCA) to achieve native title
        - Since *Mabo*, approximately 31% of the land has been given back to Indigenous Australian's through Native Title claims
        - Virtually all claims in NSW have failed due to the difficulty in establishing continual connection to the land after the impact of colonisation
- Native title has 4 main areas → **(1)** Content of traditional laws, **(2)** Membership of the community, **(3)** Connection to traditional customs, **(4)** Extinguishment of native title?

Mabo v Queensland (No 2) (1992) 175 CLR:

- **Facts** – Mabo (and others) were Murray Island occupants who claimed that they had a legal right to the Island of Mer as they continued to live in villages to this day
    - Sought declaration that the Meriam people were entitled to the Murray Islands as 'owners, possessors, occupiers or as persons entitled to use and enjoy the said islands'
- Defence argument claimed that the Crown acquired absolute beneficial ownership of all land in the territory upon sovereignty
    - Tenure system had become entrenched and could not be overturned
    - Radical title gave them ownership to all unalienated land… Defence claimed that if it was occupied by the indigenous inhabitants the radical title cannot itself be taken to confer an absolute beneficial title
- **Issue** – Whether Queensland government (Crown) was entitled to the land under the doctrine of tenure as land was declared terra nullius
- Brennan J held that despite the difficulties in establishing certain boundary and membership restrictions, it is wrong to say that the land was inalienable
- **Held** that native title can be possessed only be the indigenous inhabitants and their descendants if there is evidence of a continuing connection to the land
    - Native title is not an institution of the common law and is not alienable (taken away) by the common law
    - A native title that has cease with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition → Must be an ongoing, continuing connection to the land + traditional customs

- **LAW** – Australian law can protect the interests of members of an indigenous clan, whether communally or individually, only in *conformity with the traditional laws and customs of the people to whom the clan belongs and only where members acknowledge those customs*
    - Native title cannot be acquired from an indigenous person who does not acknowledge traditional laws, customs or values
- Native title may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence
    - Possession of the land may be protected by an individual or communal action
- The extinguishing of native title requires a clear and plain intention to do so
    - Provided ant changes made by the Crown do not diminish or extinguish the relationship between a tribe and particular land, native title is not extinguished (Deane and Gaudron JJ)
    - Can be voluntarily extinguished or can be extinguished once a clan abandons connection with the land
- **Decision** – Native title are true legal rights which are recognised and protected by the law… Where it has not been extinguished indigenous inhabitants, in accordance with their laws or customs, have entitlement to their traditional lands
    - The land entitlement of the Murray Islanders is preserved as native title
- The majority held that native title was extinguished by an inconsistent Crown grant
    - Decision meant that all acts of extinguishment of Native Title after the enactment of the Racial Discrimination Act 1975 (Cth) were unlawful, giving rise to compensation, if traditional owners were treated less favourably than non-indigenous interest holders… Could establish unlawful discrimination!
        - The extinguishment of native title is not compensable under the Constitution, but may be under *Racial Discrimination Act 1975* (Cth)
    - If a freehold lease or fee simple over land has been previously given, the rights to native title are no longer available
- All of the judges dismissed the doctrine of terra nullius (has no bearing on property rights of indigenous people) however the majority held that the doctrine of tenure is to be modified to include a co-existing right to title between the traditional owners and the state → Crown has ownership to land unless there is alternative title
    - **Radical title** confers only sovereignty and doesn't automatically extinguish native title rights… Absolute beneficial title not existent upon sovereignty
        - Crown has absolute beneficial title to vacant land however only has residual rights to create title for land which was found to be occupied
        - Radical title confers the right to create title to occupied land → Crown does not have beneficial title to all land
    - Land which was not the subject of a grant (leases given from government) are not subject to the doctrine of tenure and native titles rights may remain.
- Claimants were successful in establishing the right to Native Title over the Meriam lands (categories below were satisfied) however some land was held to be extinguished by previous grants

- Compensation was not awarded as extinguishment of the land was <u>not unlawful</u> (Mason, Brennan, McHugh and Dawson – 4/3 decision against)

Summary of Judgment:

Judge	**Does the old doctrine of tenure continue to apply in the Australian context**	**New classification of tenure (Radical Title)**	**Was Native Title established? (YES)**
Brennan (Mason, McHugh)	- The doctrine of tenure (absolute beneficial title) cannot be denied as it was a fundamental principle of the common law which was applied upon colonisation however its validity is questionable	- Tenure is still recognised however *radical title* is afforded to the Crown → Absolute beneficial title to the land where no native title rights exist (rights similar to an easement)	**(1)** From sovereignty **(2)** There must be a traditional custom/law which confers a right to the land **(3)** A continuous connection is proven (also mentioned points (4) & (5))
Deane + Gaudron	- The doctrine of tenure is existent and cannot be removed as it is now engraved in modern society	- Radical title doctrine supported (makes up the majority)	**(4)** The right hasn't been extinguished by the crime → State requires a clear + plain intention to extinguish or a fee simple grant
Toohey J	- As above. Doctrine of tenure is not to be applied 100% in Australia	- Radical title doctrine supported (makes up the majority)	**(5)** The individual plaintiff is a member of the society or can trace their lineage back to the original settlement
Dawson J (**dissent**)	- The doctrine of tenure continues to apply in Australia however the doctrine of precedent restricts the courts ability to change the discrimination	- No new classification was suggested as doctrine of precedent restricted any possibility of change	- Did not find Native Title as believed precedent could not be overturned

<u>The Doctrine of Tenure after Mabo:</u> → Changed to radical title

- The HCA held that the doctrine of tenure was a central pillar to Australian land law however the decided in favour of a modified theory of tenure
    - Radical title doctrine was favoured – The Crown only acquired absolute beneficial ownership in respect of land which was not in the occupation of Indigenous inhabitants at the time of acquisition of sovereignty
- Native title is an example of allodial title (complete/absolute – free from any restraints), not tenurial title
    - Crown does not have ownership of all land upon sovereignty!

Is Native Title a Proprietary Interest?

- s 223 (1) *Native Title Act* (established from *Mabo*) does not explicitly recognised native title as a property right, however, they are accorded the protection of the courts as if they are a definite property right → Yes, however Deane and Gaudron believe it is a right to use the land rather than own
    - Not an explicit property right however annotates a possessory right
- In *Milirripum v Nabalco Pty Ltd* (1971) 17 FLR 141 Blackburn J held that either as individuals or as representatives of a particular clans it is necessary to show that their predecessors had held a recognisable proprietary interest in the land
    - Property implies the right to use or enjoy, exclude others, and the right to alienate… Indigenous land title is not explicit however rights are still afforded

The Native Title Act 1993 (Cth):

- A legislative response to the *Mabo* decision was necessary for 3 principle reasons
    - **(1)** The necessity to validate titles issued after the Racial Discrimination Act 1975 (Cth)
    - **(2)** A requirement to make provision for permitted future development of land affected by native title
    - **(3)** The need to provide a regime for the speedy and efficient determination of issues of native title including whether or not it existed over land
- **s 223** defines native titles as the communal, group or individual rights and interests of ATSI peoples in relation to land or waters where:
    - **(a)** the rights and interest are possessed under the traditional laws and customs acknowledged and observed by the ATSI peoples
        - Includes hunting, gathering or fishing
    - **(b)** the ATSI peoples have a connection with the land or waters and
    - **(c)** the rights and interests are recognised by the common law of Australia
- The legislation is structured to validate past grants, provide that future native title cannot be extinguished without clear and unequivocal words, set up a national Tribunal and Register for Native Title claims, determine claims of compensation and provide grants of interests in land
    - Legislation provides for resolution of disputes by mediation
- Limitations are placed on the extent to which future legislation or grants can affect native title → Native title holders cannot be treated less favourably, they must agree to extinguishment and have rights to negotiate before an alternative interest is given

The Nature and Incidents of Native Title:

- The nature and incidents of native title must be ascertained as a matter of fact by reference to the traditional laws and customs observed
    - May be so expansive as to amount to exclusive possession of land and full beneficial ownership (no limits)… Will however vary from case to case
    - The starting point must be the traditions and customs of Indigenous peoples

- Native title cannot be alienated/transferred however can be surrounded to the Crown or it can be handed down from generation to generation

***Western Australia v Ward* (2002) 191 ALR 1:**

- A native title claim was brought for the land and waters covering approx. 7,900 square kilometres of land in or about the town of Kununurra in WA
    - Included irrigation areas, freehold lots and Crown land in a pastoral lease
- The HCA confirmed the definition of native title under s 223(1) of the Native Title Act whereby a sufficient connection to the land or waters must be present
    - Held that a 'spiritual' connection does not equate with the common law rights and interests under s 223(1)(c)
        - Statutory (matter of interpretation) rather than common law right??

What Rights does the Native title 'bundle of rights' contain?

- The Native Title Act offers the examples of hunting, gathering, fishing however a growing body of case law provides many other examples
- **The Territorial Sea** – *Commonwealth v Yarmirr* (2001) 208 CLR 1 held that native title could not be established over the sea. Crown had sovereign rights + interests over the waters rather than radical title
    - Native title had been diminished (not extinguished), but could still coexist with the general common law sovereign rights
        - Common law (fishing, navigate) rights which are inconsistent with traditional customs remove any native title to the sea
    - *Lardil Peoples v Queensland* [2004] FCA 298 held that non-exclusive native title over areas of riverbed were extinguished by the common law right to fish and navigate
- **Inland Waters** – Native title to hunt and fish within inland waters has been accepted by the HCA (*Yanner v Eaton* (1999) 201 CLR 351) however rights to exclude others have been extinguished by the common law public right to fish and navigate (*Gumana v Northern Territory* (2007) 153 FCR 349)
    - Native title rights over inland waters available however not exclusive
    - The HCA in *Akiba v Commonwealth* (claim for territorial rights in the Torres Strait) held that native title rights can be exercised outside the 12 mile territorial boundaries
        - Further, "no commercial fishing without a licence", was not, and is not, inconsistent with the continued existence of the relevant native title rights and interests.
- **Cultural Knowledge** – *Western Australia v Ward* affirmed that native title does not extend to the protection of intellectual property rights associated with the land – the law of intellectual propriety may offer more suitable protection than native title.
    - 'Cultural knowledge' (**eg:** Painting on a cave wall) held to be too imprecise to come under the 'connection' requirement in s 223 of the *Native Title Act*.

    - A proprietary interest to tribal secrets contained in a book may offer greater protection than Native Title (as seen in *Foster v Mountford* 1976 14 ALR 71)
- **Minerals and Petroleum** – Legislation had extinguished any possible native title rights to minerals with the possible exception of ochre (*Western Australia v Ward*)
    - There is no traditional custom to indicate rights over these commodities
- Native title is in general inalienable (cannot be taken from or given away) (*Mabo*) however there are 2 exceptions
    - **(1)** It may be surrounded to the Crown
    - **(2)** It may be acquired by a clan or member of the indigenous people in accordance with the laws and customs of that people
- **Membership of claimant group** – One does not require strict biological descent to consider themselves part of a claimant group (*Western Australia v Ward*)
    - A 'substantial degree of ancestral connection' is what is required
        - The determining factor is whether traditional laws and customs of the group allowed the person to identify as a member of the group (*Ngalakan People v Northern Territory* (2001) 112 FCR)
    - Spouses do have a native title right as the relevant connection is between the *community and the land*, not the individual and the land (*Northern Territory v Alyawarr*) → **Community connection > Individual connection**
        - Two communities which have strong social and economic links can be considered as a 'composite community with shared interests'
    - The courts have generally adopted a flexible approach to defining group native title rights, due to the flexible language of s 223. Each case depends on its own facts (*Northern Territory v Alyawarr*)
    - *Commonwealth of Australia v Abika* [2012] FCFCA 25 held that reciprocal rights held by an indigenous group do not amount to native title as there is no requisite connection with the land… Shift towards a stricter standard?
- **Ability to change native title** – In *Mabo (No 2)*, the court emphasised that native title is not 'frozen as at the moment of establishment of the colony' however it is unclear how much change is acceptable.
    - Motorised craft for traditional fishing activities was held to be a legitimate exercise of native title rights (*Yanner v Eaton*) as has the use of a modern net to engage in traditional fishing (*Stevenson v Yasso*)
        - Must consider the subjective evidence and merits of each case to establish whether the conduct correlates with traditional behaviours

Connection with the Land:

- *Mabo* established that the fundamental requirement of a connection with the land is essential for the purposes of establishing native title rights
    - Cases have not required the need for physical presence or occupation in establishing the requisite connection to the land
- **S 223(1)(b)** of the *Native Title Act 1993* (Cth) requires that "the Aboriginal peoples … by traditional laws and customs, have a connection with the land or waters"

- *Ward v Western Australia* held that the connection to the land can be evidenced by facts indicating knowledge of dreaming's which underlie the traditional laws and customs → These must continue to be maintained and passed down from generation to generation

***Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422:**

- **Facts** – Applicants made a native title claim to areas of land and water near Victoria which were said to be public land which was traditionally part of Yorta Yorta
    - The primary judge made a determination that Native Title does not exist in relation to the areas of land and water.
- **Issue** – Whether the members of the Yorta Yorta community have continually practised the traditional customs of the land
- Held that the inextricable link that is required between a society and its traditional laws and customs must be established in order to claim native title
    - Claimants must show that they descended from those who were indigenous inhabitants → Need not be formal, official documentation
    - If a society ceases to exist (**eg:** upon sovereignty), the rights and interests in land to which these laws and customs gave rise cease to exist
- It is necessary to inquire about the relationship between the laws and customs of society now and compare that to the relationship which existed at sovereignty
    - The rights that are protected are those which were existent at the time of sovereignty (must still be observed)
    - Modifications/adaptations of customs must be analysed to assess the continuing connection with the traditional values → No exact objective test
        - Changes to traditional behaviours will not necessarily be fatal to a native title claim… Question is whether they <u>presently connect</u>
    - 'Traditional' must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants
        - **<u>Continuity of traditional, pre-sovereign customs is essential</u>**
- **LAW** – It must be shown that society, under whose laws and customs the native title rights are said to be possessed, has continued to exist from sovereignty as a body united by its acknowledgement and observance of the laws and customs
    - Burden of proof (to pre-sovereignty) is on the claimants
    - Physical connection to the land does not automatically indicate membership!
    - There need not be a community to claim native title → An individual person can have native title rights
- **Decision** – Claim fails as there was no evidence that the traditional customs continued to be acknowledged… Connection could not be established back to 1788 (high, pre-sovereign burden which must be established to claim native title)

***De Rose v South Australia (No 2)* (2005) 145 FCR 290:**

- **Facts** – A group of Indigenous people claimed native title over De Rose Hill Station. One of the claimants was born under an ironwood tree (connected in accordance with this), however left the land after the death of his brother
    - He had been threatened and ejected from the land by the traditional owner who had a history of violent interactions with traditional owners of the land (matter of separation form the land is considered an important matter)
- **Issue** – Whether the claimant has abandoned their connection with the land after he had left the land + whether he forms part of the community
- **Held** – Membership to an indigenous community is established through evidence of direct lineage (tracing a biological connection to the pre-sovereign clans)
    - Non-biological connection to the community is also possible if one is seen as part of the community and having connected to the traditional customs
    - Spouses can be part of the community as long as the traditional values allow for parties who marry into a tribe to form part of the membership
    - The court accepted the possibility of maintain a connection despite a claimant ceasing to reside their due to 'European social and work practice'
        - Consideration of traditional laws and customs is the paramount importance, rather than any physical connection
        - Everything will depend on the circumstances/facts of the case!
    - **Community or group must show that the claimant recognised and acknowledged the traditional laws and customs**
- **Decision** – Many aspects such as ceremonial advancements through life, smoking of a newborn baby, restrictions of secret male knowledge and traditional rights and responsibilities indicated that native title exists as pre-sovereign customs and laws continue to exist despite some physical separation from the land

Connection with the land (cont.):

- Native title claim failed in *Jango v Northern Territory* (2006) 152 FCR 150 as the claimants could not show that they were part of a group of Western Desert people exercising traditional laws and customs
- *Bennell v Western Australia* (2006) 153 FCR 120 endorsed the view that a connection may exist regardless of a physical presence om the land
- *Risk v Northern Territory of Australia* [2006] FCA 404 demonstrates that where interruptions affect the presence of a claimant and the interruption subsequently affects the continued observance of traditional customs the necessary connection will not exist
    - Relevant connection in communal claims is between the community as a whole and the land which is the subject of the claim
- Connection to traditional customs and laws must date back to pre-sovereign time (*Harrington-Smith on behalf of the Wongatha People v Western Australia*)
    - Connection may be mainly spiritual rather than physical (*Worimi v Worimi Local Aboriginal Land Council* [2010] FCAFC 3)

The Extinguishment of Native Title:

- In *Mabo* Brennan J held that at common law native title could be extinguished without the consent of Aborigines and without the payment of compensation
    - There must be a clear and plain intention to do so!
        - Intention evidence by a legislative provision, an inconsistent grant of an interest or Crown acquisition of native title land
    - Extinguishment of native title is conclusive regardless of whether a continuing connect can be proven

<u>Grant of a Freehold Estate:</u>

- A grant of a freehold estate will demonstrated a clear and plain intention to extinguish native title (*Fejo v Northern Territory* (1998) 195 CLR 96
    - Fee simple giving exclusive, indefinite possession (where others are not permitted to enjoy the land) will extinguish native title
    - Once native title has been extinguished it cannot be revived
        - Crown has a right to <u>reversion</u> (reclaim title) thus, native title is not available to traditional owners
- Where subsisting native title is inconsistent with the enjoyment of fee simple rights (absolute exclusive possession), native title is extinguished

<u>Pastoral Leases and Extinguishment:</u>

***Wik Peoples v Queensland* (1996) 187 CLR 1:**

- Appellants claimed native title over land which had been subject to pastoral leases
    - The FC held that pastoral leases conferred exclusive possession upon the grantees and extinguished all incidences of Aboriginal title → HCA allowed an appeal in holding that pastoral leases <u>did not extinguish</u> native title
- **LAW** – 'Native title is extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or leasehold estates'
    - Held that pastoral leases did not evidence a clear, plain and distinct authorisation by the relevant grant of acts necessarily inconsistent with all species of native title that might have been existed
- A pastoral lease is different from a leasehold estate as they do not confer rights of exclusive possession, thus native title does not interfere with any traditional laws, customs or indigenous uses of land
    - Is not exclusive… Becomes a case-by-case analysis of whether the native title rights and pastoral lease can co-exist
- Native title will be extinguished where there is a clear and plain intention on the part of the legislature → Rights are only abrogated by the granting of a pastoral lease if exclusive possession is conferred in clean and plain language

Leases conferring rights of exclusive possession:

***Western Australia v Ward* (2002) 191 ALR 1:**

- The HCA held that each lease is to be determined on its individual merits where one decided whether a clear and plain intention is existent to extinguish native title or whether the rights have been extinguished by some Crown grant
- Extinguishment – 'It is plain that the rights held under at least some grants of interests in less than a fee simple are inconsistent with the continued existence of native title rights'
    - Native title rights only extinguished if lease gave the holder rights to exclusive, absolute possession which allowed traditional owners to be excluded… Early leases gave no right to exclude thus native title rights remain
    - Questions of extinguishment require identification and consideration of the native title right or interest that is in issue
    - Held that native title can be partially extinguished (confirmed in *De Rose v SA* where parts of land which had been improved could not be claimed)
- Decision – The law/lease did not confer exclusive possession after the lease finished as claimants could still pass over the land and do all kinds of things
    - Native title continued to unaffected by the grant of a lease

Leases Containing Reservations in Favour of Indigenous Inhabitants:

- Native title is extinguished to the extent that the grant of a pastoral lease involves granting rights inconsistent with native title rights (*Griffiths v Northern Territory*)
    - Rights that are inconsistent with a lease are extinguished (*Jango v NT*)
        - Underlying issue in relation to native title rights is the scope of inconsistency between the historic pastoral leaseholder's rights and the applicant's native title rights and interests

Statute:

- A statutory provision demonstrates a 'clear and plain intention to extinguish' native title will be effective to bring native title to an end
- A statute directed to regulating an activity (eg; owning all of the fauna in QLD) does not necessarily demonstrate a clear and plain intention to extinguish native title (*Yanner v Eaton* (1999) 166 ALR 258)

***Commonwealth of Australia v Akiba* [2012] FCAFC:**

- **Facts** – Residents of a number of Torres Strait islanders claimed native title to parts of the Torres strait on the basis that the right to fish and trade their catch was part of their traditional law and custom
- **Issue** – Whether the right to the land was extinguished by the Qld Fisheries Act and the Cth Fisheries Management Act… Argument was that the legislation was regulatory only and did not show a prohibitory intention to extinguish native title

- FCA confirmed the 'inconsistencies of incidents approach' → Where native title and a statutory provision clash, native title will be extinguished
    - Extinguishment leaves no room for revival… Once the native title to take fish for commercial reasons was extinguished, it could not be revived
    - **Held** that native title was inconsistent with the law therefore the right to trade fish was refused. The native title rights to fish remain (although a license must be applied for) however they cannot be sold
- **HCA** (further appeal) found that the legislation was regulatory therefore <u>lacked a clear and plain intention</u> to extinguish native title
    - No native title extinguishment → Rights over the waters is recognised

The Native Title Amendment Act 1998 (Cth):

- The Native Title Amendment Act was introduced after *Wik* and introduced the following changes:
    - A higher threshold test for registration of native title claims… Registrar must be satisfied that a prima facie native title claim exists before proceeding
    - Amendments provide for the extinguishment of native title in respect of all acts and grants in relation to non-vacant Crown lands
    - A greater diversification of activities on pastoral leases without the need for negotiation with Indigenous peoples was introduced
    - Act provided that certain 'previous exclusive possession acts' have extinguished native title
    - Significant restrictions were imposed on the right of Indigenous persons to negotiate in relation to mining projects