Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (The Federation Press, 2008, ISBN 9781862876477, AU$125, 528 pages)

REVIEWED BY THALIA ANTHONY*

This book transforms research on Australian native title jurisprudence. It positions the jurisprudence in an international context and within interdisciplinary debates. Young thoughtfully analogises native title developments in the comparative jurisdictions of Australia, the United States, Canada and New Zealand. It is through his comparative approach that Simon Young is able to reveal the distinctly limited approach of the Australian courts in assessing the 'traditional laws and customs'. Young suggests that courts have gone badly awry showing an undue preoccupation with 'tradition' that has prevented proof of Indigenous change.

However, the book is much more than a detailed examination of native title jurisprudence internationally. It draws on socio-legal research on Indigenous culture and land relationships to argue that Australia relies on an over-specific, Westernised notion of 'traditional laws and customs'. This reliance limits claimants' proof of continuity in land connection to specific instances and affords successful claimants cultural, rather than also commercial, rights.

In his preface, Young claims that his native title research 'smacked of algebraic difficulty lurking quietly in the middle of a legal field dominated by noisy socio-political dilemmas'.[1] However, through the course of his book Young unpacks beautifully these dilemmas and points to not only the flaws of native title jurisprudence, but also potential avenues, gained through an understanding of international native title developments.

In his chapter 'The Excesses in the Australian Case Law', Young raises the problems that arise in the 'proof' and 'content' of Australian native title. This is borne out in his study of *Western Australia v Ward* (2002) 213 CLR 1 ('*Ward*') and *Yorta Yorta v Victoria* (2002) 214 CLR 242 ('*Yorta Yorta*'). For Young, *Ward* gave jurisprudential 'shape' to a requirement of tradition in the content of native title rights.[2] Native title rights were limited to 'traditional' rights to possess, occupy, use and enjoy the land, or maintain and protect places of importance under traditional laws, customs and practices. It did not extend, according to Callinan J, to rights to 'seek or use subterranean materials or minerals … or a right to inhibit, dictate or influence the rights of others to do the same'.[3]

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1 Simon Young, *The Trouble With Tradition* (2008) at xxiii.

2 Id at 304.

3 Id at 306.

Yorta Yorta, on the other hand, is provided as an example of excesses concerning 'proof' of native title. Young shows that in that case 'tradition' is used to deny native title to Indigenous communities most directly and severely affected by contact with non-Indigenous society. Young argues that the High Court's majority reasoning in these decisions was not the only approach open to the Court, as seen specifically in Canada. They could have traversed a path away from the 'historical legalism' or 'cultural paramountcy' seen in these decisions.[4]

In the final section, Young reconceptualises native title. He provides a Three-Point Plan for doing justice to Indigenous proprietary interests. The first step is to distinguish title from rights (bundles of rights or exclusive specific rights). The second step is to distinguish communal interests from inter se interests for both rights and interests. Communal interests are afforded where there is proof of traditional laws and customs. Where there are contemporary laws and customs, inter se interests are provided. The third step is to establish the proof and content of these interests.

This is a wonderful contribution to native title jurisprudence. *The Trouble with Tradition* maps the native title landscape thoroughly and clearly. Young's signposts for future directions in the growing field of native title case law are food for thought for any Federal or High Court judge adjudicating native title matters. They may also stimulate a rethink of the *Native Title Act* 1993 by the Federal Labor government. However, the book's impact is broader than Australian native title law. It reveals the potential for comparative law to enlighten policy and case law and provide for informed and critical scholarship.

4 Id at 338.