NATIVE TITLE CONFERENCE 2009

Proof and Continuity under s223


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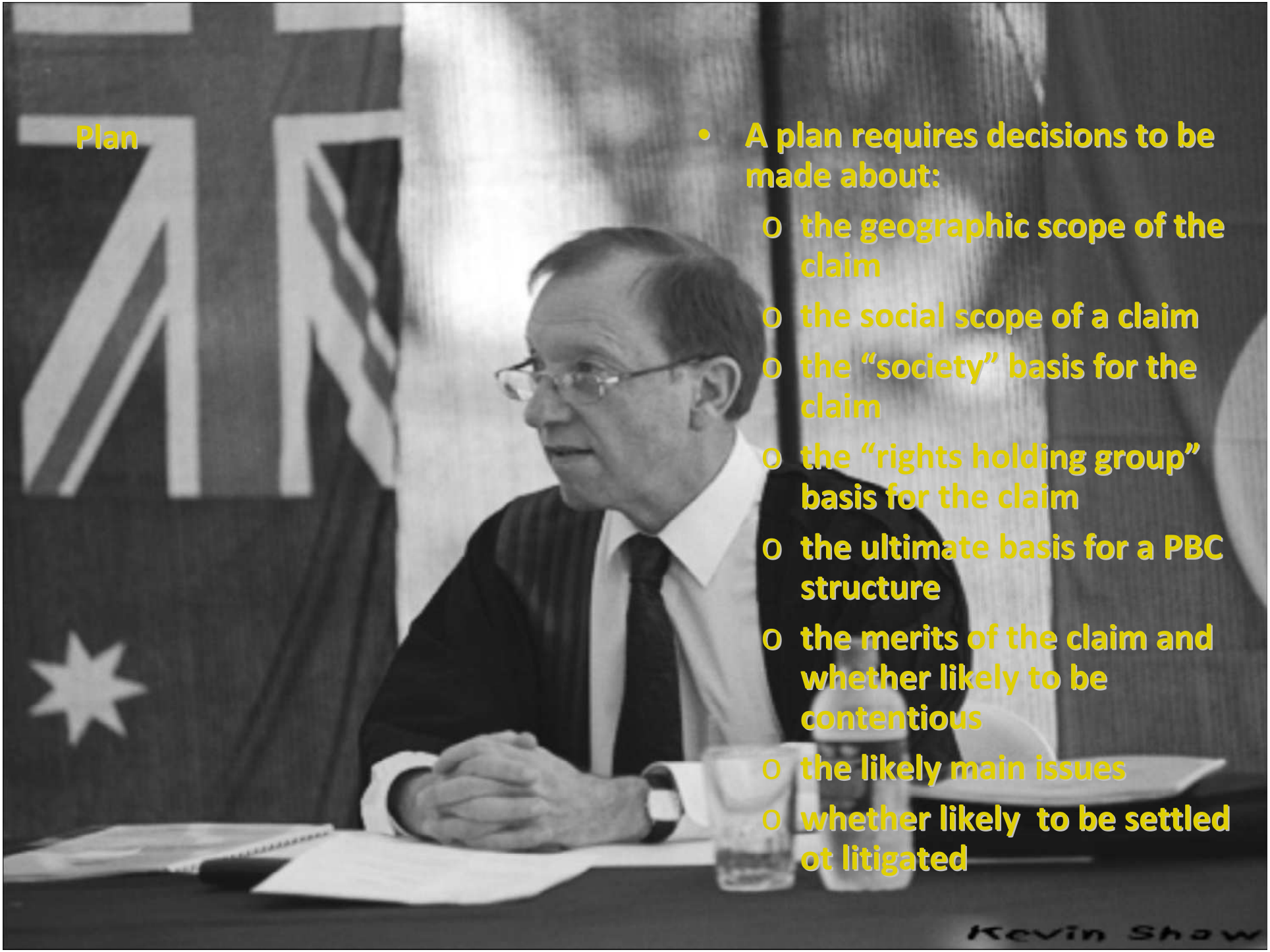
Blackburn Chambers, Canberra

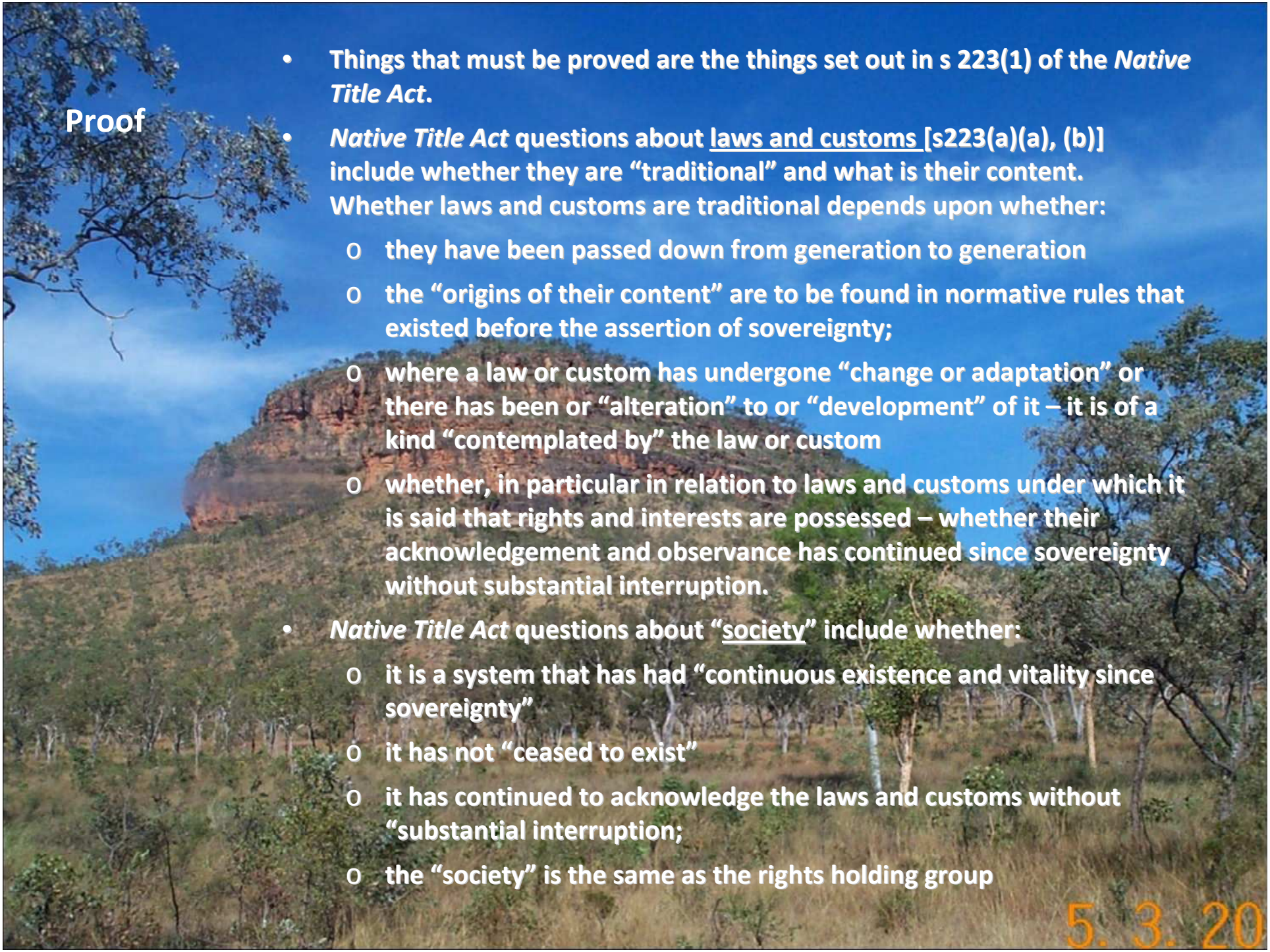
Plan

But first, a plan. In the end, the plan may be the most important thing

- A plan can only be informed by research and consultation – extensive research involving a team of researchers with much user friendly legal input and consultation with claimants and within the team


Plan
A plan requires decisions to be made about:
the geographic scope of the claim
the social scope of a claim
the "society" basis for the claim
the "rights holding group" basis for the claim
the ultimate basis for a PBC structure
the merits of the claim and whether likely to be contentious
the likely main issues
whether likely to be settled ot litigated
Kevin Show


Proof
• Next, a pleading. The Form 1 - the native title determination application. This is a critical document
• And then the proof – whether only to a standard that addresses a State requirement for negotiations or whether to a standard that will meet the requirements of the rules of evidence so that it may be used in Court if necessary


Proof
• Things that must be proved are the things set out in s 223(1) of the *Native Title Act*.
• *Native Title Act* questions about laws and customs [s223(a)(a), (b)] include whether they are "traditional" and what is their content. Whether laws and customs are traditional depends upon whether:
o they have been passed down from generation to generation
o the "origins of their content" are to be found in normative rules that existed before the assertion of sovereignty;
o where a law or custom has undergone "change or adaptation" or there has been or "alteration" to or "development" of it – it is of a kind "contemplated by" the law or custom
o whether, in particular in relation to laws and customs under which it is said that rights and interests are possessed – whether their acknowledgement and observance has continued since sovereignty without substantial interruption.
• *Native Title Act* questions about "society" include whether:
o it is a system that has had "continuous existence and vitality since sovereignty"
o it has not "ceased to exist"
o it has continued to acknowledge the laws and customs without "substantial interruption;
o the "society" is the same as the rights holding group
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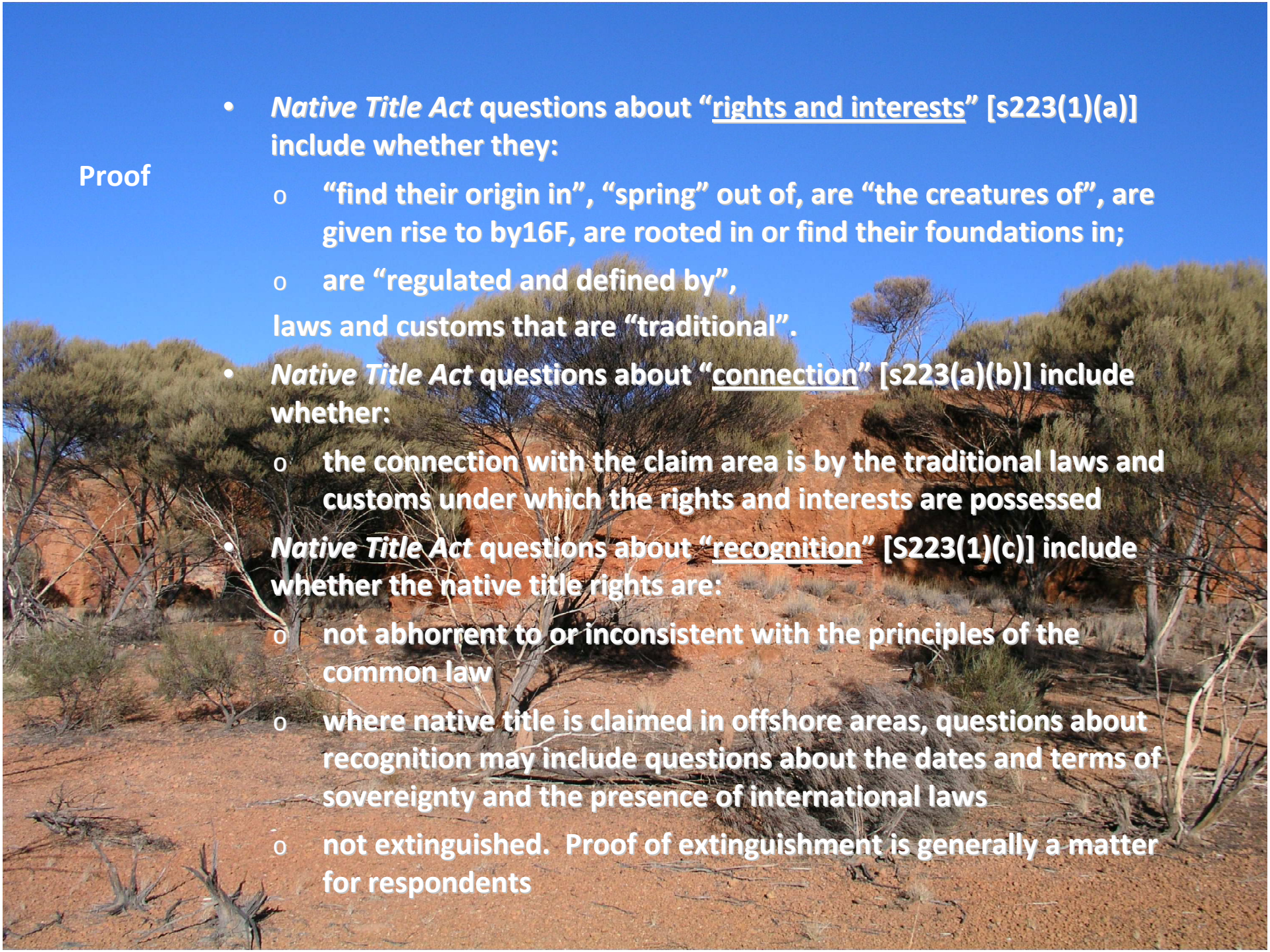
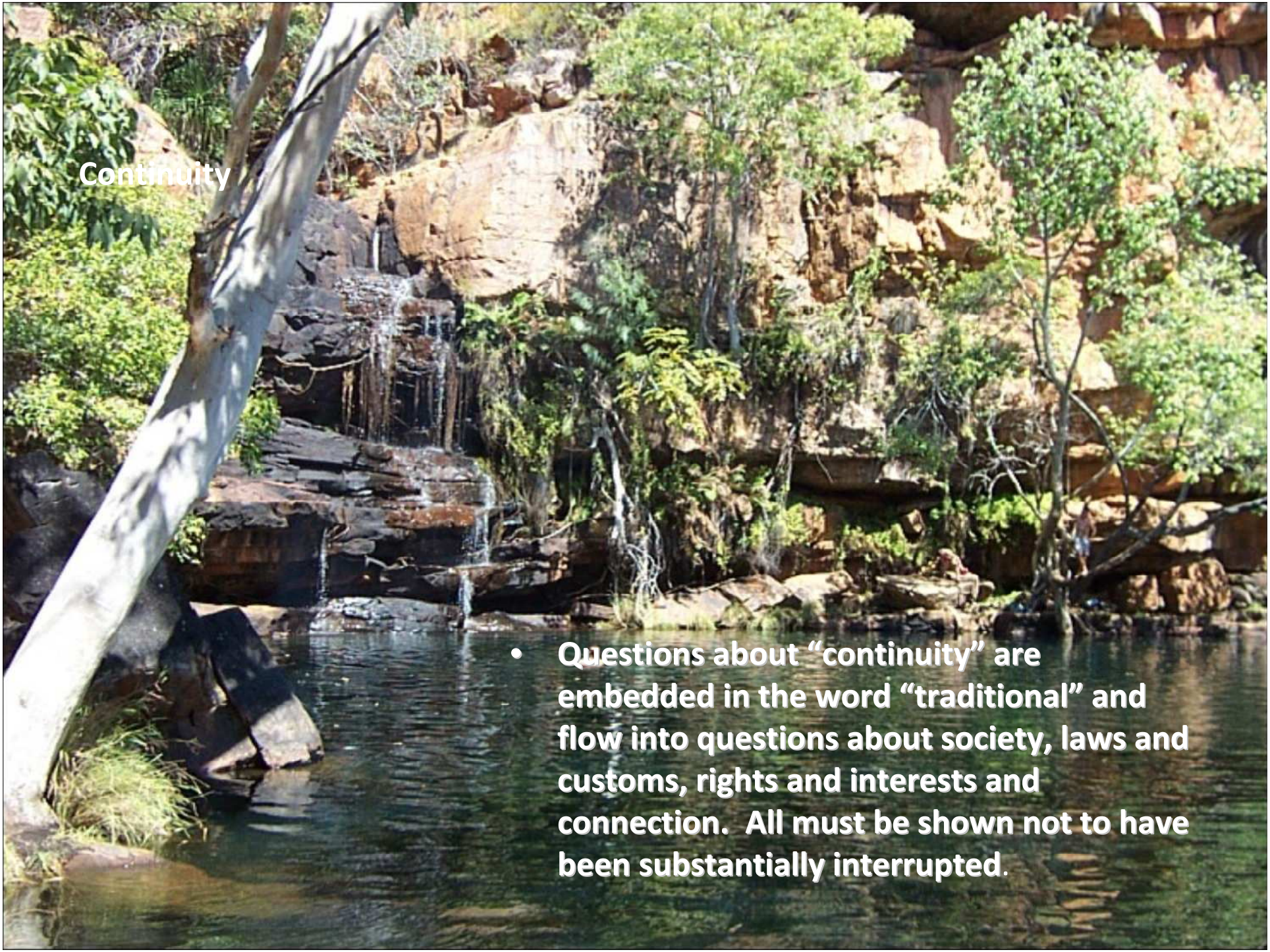
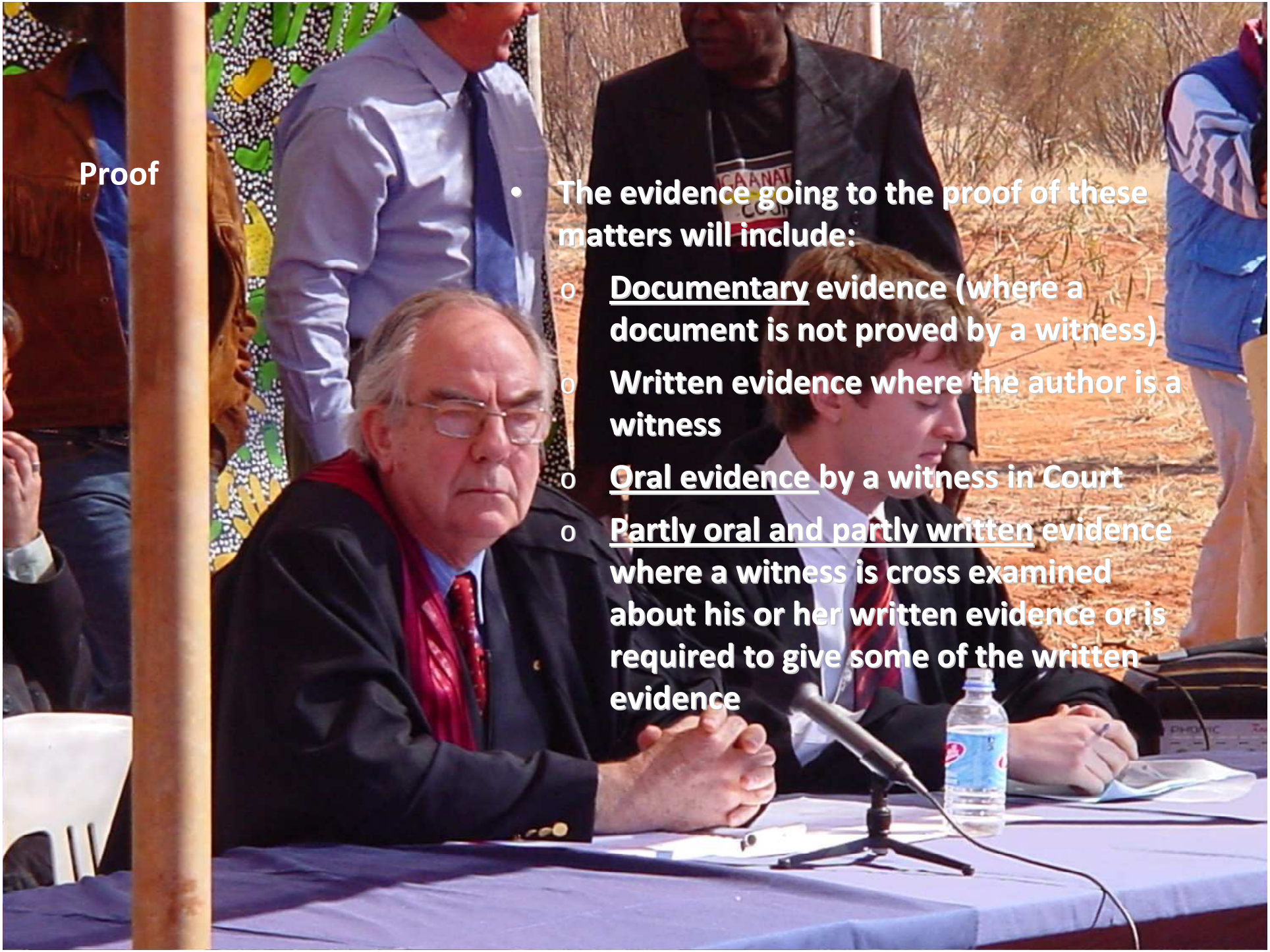


Proof

- *Native Title Act* questions about "rights and interests" [s223(1)(a)] include whether they:
  - "find their origin in", "spring" out of, are "the creatures of", are given rise to by16F, are rooted in or find their foundations in;
  - are "regulated and defined by",

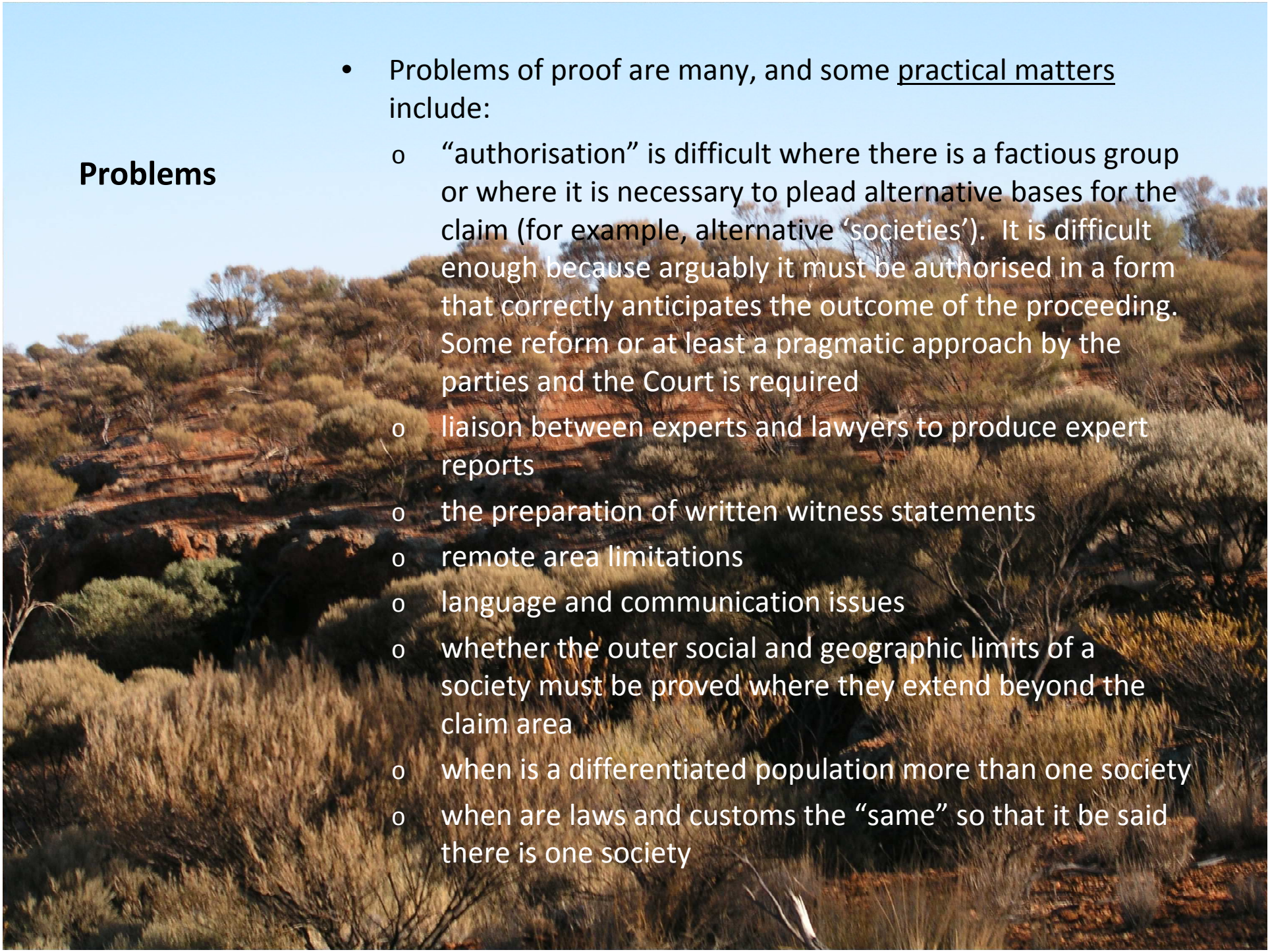
  laws and customs that are "traditional".
- *Native Title Act* questions about "connection" [s223(a)(b)] include whether:
  - the connection with the claim area is by the traditional laws and customs under which the rights and interests are possessed
- *Native Title Act* questions about "recognition" [S223(1)(c)] include whether the native title rights are:
  - not abhorrent to or inconsistent with the principles of the common law
  - where native title is claimed in offshore areas, questions about recognition may include questions about the dates and terms of sovereignty and the presence of international laws
  - not extinguished. Proof of extinguishment is generally a matter for respondents


Continuity
• Questions about “continuity” are embedded in the word “traditional” and flow into questions about society, laws and customs, rights and interests and connection. All must be shown not to have been substantially interrupted.



Proof

- The evidence going to the proof of these matters will include:
  - Documentary evidence (where a document is not proved by a witness)
  - Written evidence where the author is a witness
  - Oral evidence by a witness in Court
  - Partly oral and partly written evidence where a witness is cross examined about his or her written evidence or is required to give some of the written evidence

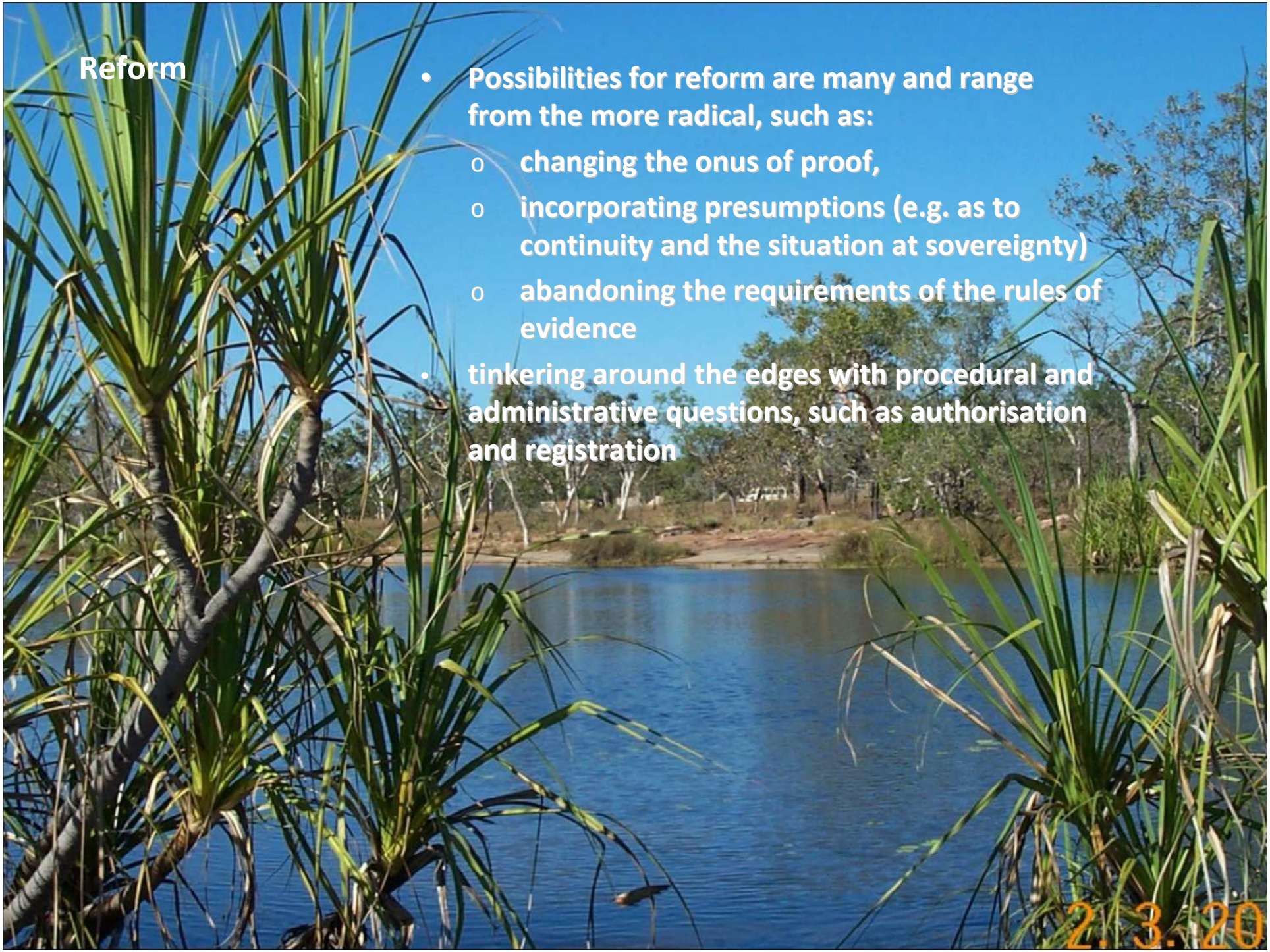


Problems

- Problems of proof are many, and some practical matters include:
  - "authorisation" is difficult where there is a factious group or where it is necessary to plead alternative bases for the claim (for example, alternative 'societies'). It is difficult enough because arguably it must be authorised in a form that correctly anticipates the outcome of the proceeding. Some reform or at least a pragmatic approach by the parties and the Court is required
  - liaison between experts and lawyers to produce expert reports
  - the preparation of written witness statements
  - remote area limitations
  - language and communication issues
  - whether the outer social and geographic limits of a society must be proved where they extend beyond the claim area
  - when is a differentiated population more than one society
  - when are laws and customs the "same" so that it be said there is one society

Reform

- Possibilities for reform are many and range from the more radical, such as:
  - changing the onus of proof,
  - incorporating presumptions (e.g. as to continuity and the situation at sovereignty)
  - abandoning the requirements of the rules of evidence
- tinkering around the edges with procedural and administrative questions, such as authorisation and registration



Reform

- Thinking about reform might also include consideration of:
  - organising the Court so that some judges have some specialisation in native title trials and the management of native title cases

  - removing “connection” as a separate requirement
  - shifting the emphasis of the word “traditional” from involving continuity from the ‘at sovereignty’ past; perhaps by shifting an evidentiary bury of proof onto respondents in relation to those matters so that the primary evidentiary task of the Applicant is in relation to the present situation
  - reducing uncertainties surrounding the role, content and limits of the “society” requirement

Reform

- Thinking about reform could be directed to shifting or reducing the costs burden generally, and in relation to sharing of the burden by the Applicant, the Respondents and the Court. For example:
  - where government parties are represented and active, a 'show cause' requirement could be imposed on other publicly funded respondents. Every additional active respondent imposes significant costs burdens on the main parties and the Court.
  - the requirement for written witness statements of claimants involves extraordinary expense, and where it is undertaken, the efficiencies sought from them could be enhanced
  - remote area hearings for the evidence of indigenous witnesses could be regarded as the norm rather than an exception

Reform

- Thinking about reform might also include consideration of:
  - including as a standard of a determination of native title that the descriptions of the native title holders and rights and interests be such as to facilitate the protection of (or at least not do violence to) the operation of the native title holders' system of laws and customs, and to make clear that a determination does not need to detail matters which if left 'intramural' will served that purpose
  - how to generally elevate the level of debate between Applicants and respondents away from what appears to have become a starting assumption that the only correct way of seeing the 'real picture' of the claimants' system is as a collection of jigsaw pieces each of which must be traceable over time since sovereignty.