engaged in such a process is less widely acknowledged. Law - at least according to formalist conceptions of its function - is at once the repository of age-old wisdom but a-temporal, and thus neutral, in its application.[31]

The collective memory of land law relates to the authoritative, institutional and doctrinal 'memory' of Australian 'history' that is part of the stories that law, at a number of levels, tells itself, and of itself. To be accepted as legal memory requires a consequent closure of other possibilities.[32] As a public, authoratitive memory of the origins of land law, the doctrine of tenure, despite its feudal antecedents, has assumed a modern regulatory and iconoclastic function that obscures other possibilities.

We have traced through several examples of how the common law is involved in reshaping its past to incorporate a reinvigorated doctrine of tenure. To what end? Czarnota argues that in many countries experiencing political and social change that law is not 'adopting the dominant historical narrative, law is attempting to reconstruct and recreate it.[33] Examples of this phenomenon range from the Truth and Reconciliation Commission in South Africa to international law and the instigation of trials for crimes against humanity. In these situations law is attempting to deal with a difficult or suppressed past while maintaining a continuity with existing institutional authority.

The exhaustive post *Mabo* angst that has enveloped Australia reveals the depth of social and political change - or at least its potential. Law attempts to mediate this change in a democratic society through the creation or appropriation of 'collective memories and originary pasts.' At a doctrinal level this process has involved the substitution of stories of first occupation and traditional indigenous culture for terra nullius. But in terms of the most evocative analogy from *Mabo [No 2],* this substitution has effected a continuation that has not 'fractured the skeleton of the common law'.[34]

---

31 Peter Goodrich, 'Poor Illiterate Reason: History, Nationalism and Common Law', (1992) 1 *Social & Legal Studies* 7, 10.

32 I Stewart, 'Closure and the Legal Norm: An Essay in the Critique of Law', (1987) 50 *Modern Law Review* 908.

33 See A Czarnota, 'Law's Expanding Empire: Legal Institutions and Collective Memories', Work in progress Seminar delivered at Law School, Griffith University, Wednesday 30/6/99.

34 *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1, 29.

Conclusion

Law and lawyers are only beginning to discover Australia's history, long known to historians, anthropologists, sociologists and other disciplines. The 'history' that law has previously told itself through its iteration in textbooks and legal principles has been an English history.[35] While lawyers are discovering Australian history, this discovery has yet to make a substantial impact on, or become fully part of, the official legal history narrative and collective memory. Traditional concepts of English land law, 'still exert in this country a fascination beyond their utility in instruction for the task at hand'.[36] Lawyers still seem to need to imagine our origins within a common law framework, not a broader constitutional and statutory framework. The notion of actively considering sovereignty - the power of the sovereign nation state of Australia to order its own collective memories and its lands - still seems to make lawyers uncomfortable.[37] Some might argue that to dispute the common law originary moment risks unsettling the reshaped collective memory that has allowed English land law to incorporate native title. However, it has been this very re-fashioning of the collective memory which has reinforced law's ability to institutionalise its own origins, even though the narratives comprising those origins have changed.

In summary, the legal stories of the origins of land law have shifted. Narratives based around the doctrine of tenure are more inclusive, but they remain partial histories. There is a need for further re-evaluation of the conceptual structures and symbolic sources of land law in Australia.

---

35 See generally, P Goodrich, above n 29, who argues that the common law is a distinctively English phenomenon.

36 *The Wik Peoples v The State of Queensland & Ors* (1996) 187 CLR 1, 177.

37 For lawyers educated within a tradition emphasising a strict doctrine of the separation of powers this unease is, perhaps, understandable.

*Roderic Pitty**

A POVERTY OF EVIDENCE: ABUSING LAW AND HISTORY IN *YORTA YORTA V VICTORIA* (1998)

INTRODUCTION

Evidence of Australia's history of continuous human occupation and custodianship, recorded not in writing but in an oral culture, was ignored by newcomers who presumed the moral superiority of their material civilization with its expansionist ethos. The modern history of white Australia, in Bernard Smith's words, became a land 'permeated by a conquest psychology,' a sad place where 'the principles of universal justice championed by the philosophers and lawyers of the Enlightenment began their long process of degeneration'[1]. To what extent has this retreat from justice been extinguished by recent recognition of indigenous title in Australia's common law? Not much, on the evidence of Justice Olney's decision in the *Yorta Yorta* case in 1998.[2]

The *Yorta Yorta* claim was left to be resolved by the Federal Court after the failure of extensive mediation efforts conducted during 1994 and 1995 by the National Native Title Tribunal. The failure of mediation reflected several problems with the processing of native title claims in a situation of legal uncertainty. The NSW and Victorian Governments denied the continuing existence of native title; NSW, in fact, 'withdrew from the mediation in the early stages' on this presumption.[3] Local media

---

* BA Hons (Macquarie U), Ph.D. (ANU); Research Affiliate of the Newcastle Legal Centre.

1 Bernard Smith, *The Spectre of Truganini: 1980 Boyer Lectures* (1980) 18, 36.

2 *The Members of the Yorta Yorta Aboriginal Community v The State of Victoria and Others* (1998) 1606 Federal Court of Australia (18 December 1998). All subsequent references are by paragraph. Much of Justice Olney's judgment, which has been appealed to the full Federal Court, is excerpted in *Australian Indigenous Law Reporter*, Vol. 4, No. 1, March 1999, 91-113.

3 Michael Dodson (Aboriginal and Torres Strait Islander Social Justice Commissioner) *Native Title Report July 1994-June 1995* (1995) 101.

misinformed non-Aboriginals about what counsel for the claimants described as 'a series of claims to land of a very restricted nature, with it essentially being crown land'[4]. According to Wayne Atkinson, a Yorta Yorta researcher, his people 'went to the native title committee in good faith, attempted to negotiate, attempted to come to an agreement, but in the final analysis we did not get one agreement from the other parties'[5]. Yorta Yorta claimant Margaret Wirapunda saw the claim system as an 'unjust reversal' in which it was assumed by others that 'the claimants come to the table as aspirants for rights, whereas all the other parties have rights that are sanctified by law'[6]. Mediation failed because of this gap between the parties, with the indigenous people required 'to prove that they have a connection to land' dating from the time of the invasion, a requirement not made of 'the intruders [who] don't have to justify their expropriation of Aboriginal land'[7].

The rejection of Yorta Yorta native title by Justice Olney, which might be called his retreat from justice, involves several issues. First, he developed a negative definition of native title, based on selected assertions by Justice Brennan. Specifically, Justice Olney focussed on two statements by Justice Brennan; the one an aside in *Mabo No 2*, in which Brennan stated 'since European settlement, many clans or groups of indigenous people have been physically separated from their traditional land and have lost their connexion with it', and, the other, Brennan's statement that 'when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition'[8]. This sweeping proposition was adopted by Justice Olney,

---

4 Bryan Keon-Cohen, speaking to the Commonwealth Parliament's Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Melbourne, 2/10/96, Hansard report, NT 2835. Katrina Alford, 'Giving the Living their Due', (October-November 1999) *Arena Magazine* No. 43, 41.

5 Wayne Atkinson, speaking to the same committee on the same day, Hansard report, NT 2930.

6 Cited, together with Elizabeth Hoffman, in Dodson, *Native Title Report 1994-95* 103, 104.

7 Ibid.

8 *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 59-60. Significantly, Brennan stated (58-9) that 'some general propositions about native title can be stated without reference to evidence'; he gave no guidance about interpreting evidence

who made no reference to either the judgment of Justices Deane and Gaudron or that of Justice Dawson. Olney also misconceived Justice Toohey's analysis of 'presence amounting to occupancy' as the 'foundation' for indigenous title, by focussing not on the fact of occupation, but on a particular kind of way of life. [9] Whereas Deane and Gaudron, like Toohey and Brennan, specifically warned against reducing native title to a static traditional way of life, Dawson argued that social changes like the introduction of Christianity had nullified any basis for native title in customary law.[10] Like Dawson, Olney claimed that if any government set aside reserves for Aboriginal use, this was just a benevolent act of an overwhelming sovereign, not a partial acknowledgement of Aboriginal prior ownership, as Yorta Yorta ancestor William Cooper claimed in 1887, speaking of the Cumeragunja reserve on the Murray river north of Echuca.[11]

Second, Justice Olney stated his intention to disregard 'pure speculation' when affirming that the *Native Title Act* does not permit 'the Court to play the role of social engineer, righting the wrongs of past centuries and dispensing justice according to contemporary notions of political correctness rather than according to the law.'[12] Yet his principal documentary source on the central issue of Yorta Yorta custom is a book by Edward Curr, a 'colonial gentleman', whose veracity has been questioned by both his contemporaries and subsequent historians.[13] Curr, as Diane Barwick has established, was publicly criticised for his 'ignorance of

---

of native title, particularly regarding his statement of Australian common law that: 'It is immaterial that the laws and customs [of the indigenous owners] have undergone some change since the Crown acquired sovereignty provided the general nature of the connection between the indigenous people and the land remains.' He merely said observance of traditional custom meant 'so far as practicable' (70).

9 *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 58-59 per Brennan J, and 187-90, 192 per Toohey J, who stressed that 'an indigenous society cannot, as it were, surrender its rights by modifying its way of life.'

10 Ibid 61 per Brennan J, 110 per Deane and Gaudron JJ, 157-58, 160-61 per Dawson J, and 192 per Toohey J.

11 Ibid 140, 159-60; *Yorta Yorta v Victoria* (1998) [119-121]; William Cooper, Cumeragunja, 1887: 'Return to us this small portion of a vast territory which is ours by Divine Right', quoted in Heather Goodall, *Invasion to Embassy: Land in Aboriginal Politics in New South Wales, 1770-1972* (1996) v.

12 *Yorta Yorta v Victoria* (1998) [17].

13 E M Curr, *Recollections of Squatting in Victoria* (2nd (revised) ed, 1965).

Aborigines . . . in a series of official investigations . . . culminating in an 1881 Parliamentary inquiry.[14] This occurred before he published 'recollections' of what he claims to have seen in the 1840s. Because Justice Olney attempts, in his own words, 'to avoid assuming the role of historian', he consequently ignores vital methodological issues about the reliability of evidence when accepting Curr's book as evidence.[15] Such issues are particularly important because of another general proposition stated by Justice Brennan in *Mabo No. 2*, namely that where indigenous people 'remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives.'[16] The only acknowledgment in Justice Olney's judgment of the need to consider the way an indigenous community identifies itself concerns his reference to an 1881 petition for land to the Governor of New South Wales signed by known ancestors of the Yorta Yorta claimants. Justice Olney interprets the petition as evidence of an abandonment of traditional laws and customs by the Yorta Yorta because it requests a grant of land and states: 'We have been under training for some years and feel that our old mode of life is not in keeping with the instructions we have received and we are earnestly desirous of settling down to more orderly habits of industry, that we may form homes for our families.'[17] Justice Olney does not mention that, when this petition was organised by the Maloga missionary Daniel Matthews, the people were so malnourished that a Victorian Protector of Aborigines, Mr McKenzie, said: 'truly they are half-starved during the winter months at Maloga, for the want of food—well clothed but short of Rations; they often ask me to apply

14 Diane E Barwick, 'Mapping the Past: an Atlas of Victorian Clans 1834-1904', *Aboriginal History*, 103. Barwick also comments: 'Recent reprints have made Curr's books widely accessible and his views are often uncritically quoted by modern writers unaware of their falsity. . . . where his summaries and quotations can be checked against published material it is clear that he distorted sources in a most unscholarly fashion to support his arguments.' Curr also relied on hearsay: 'In his 1883 and 1886-87 publications [he] admitted that his interest in ethnography began in '1872' and his account of Victorian 'tribes' relied on the memories of 'old settlers' rather than records of the 1840s' when squatting on the frontier as a pastoralist in his twenties (110).

15 *Yorta Yorta v Victoria* (1998) [26].

16 *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 61 per Brennan J.

17 Ibid [119]. The petition is in Nancy Cato, *Mister Maloga* (1993) 279-80, reproduced from the Sydney *Daily Telegraph*, 5/7/1881.

for a home for them on this side of the Murray.'[18] Nor does Justice Olney acknowledge Matthews recording at the end of 1883, on a summer trip to the Moira Lakes: 'Most of the Blacks have a kind of longing for camp life, so we indulge them once a year in this way. There is a certain charm and freedom about this rustic life. . . . The men stripped bark canoes from the gum trees in order to catch game for Sunday.'[19] In another recent native title case, the full Federal Court has confirmed that Australian law should recognise the continuing connnection of an Aboriginal community to their traditional lands 'even where physical presence has ceased, either because the indigenous people have been hunted off the land, or because their numbers have become so thinned that it is impracticable to visit the area'; the Court also stated that 'evidence of present members of the community, which demonstrates a knowledge of the boundaries to their traditional lands, in itself provides evidence of continuing connection through adherence to their traditional laws and customs.'[20] Justice Olney disregarded precisely such evidence, which clearly conflicted with the speculative recollections of Curr.

Third, Justice Olney adopted an individualistic approach to analysing the known ancestors of Yorta Yorta inhabitants, ruling that inheritance of native title can be recognised by Australian law only where there is conclusive written evidence of 'a genealogical connection with the indigenous inhabitants of the claim area in 1788', when he assumes Britain gained sovereignty.[21] This meant that only two out of eighteen Yorta Yorta ancestors were regarded by Justice Olney as having the legal capacity to pass on to their children any native title rights that the Yorta Yorta community retained. This aspect of Justice Olney's judgment assumed the superiority of any written record over oral tradition, disregarding the possibility of mistaken identification of kinship in such records, which after all had to be based on original family knowledge. Although the depth of Yorta Yorta genealogical knowledge had been affirmed in a recent publication from the National Native Title Tribunal about indigenous descent, Justice Olney did not assess the integrity of such knowledge

18 Cato, *Mister Maloga* (1993) 107.

19 Ibid 115.

20 *State of Western Australia v Ben Ward and Others* [2000] FCA 191 (3rd March 2000) [243] per Beaumont and von Doussa JJ, an opinion which North J agreed with, dissenting primarily about extinguishment.

21 *Yorta Yorta v Victoria* (1998) [99]. *Cf.* [88].

concerning the status of particular Yorta Yorta ancestors. He argued instead that the general 'disturbance of the Aboriginal population which followed European settlement' meant that the tribal affiliation of most Aboriginal people could not be clearly determined.[22] Unfortunately, space does not permit detailed analysis of all the issues raised here. This article focuses on the crucial problem of how historical evidence was assessed in Justice Olney's judgment, since this point links the above concerns with a discussion of the role of historians in determining native title.[23]

THE USE AND ABUSE OF HISTORICAL EVIDENCE

While there are substantial geographical and social differences between the land at issue in the *Mabo* case and the land and waters claimed in *Yorta Yorta*, a fundamental similarity concerns the relation between written and oral evidence. This is a crucial issue of method bound to arise in all native title cases, although unfortunately there is no adequate guidance to be found in the *Native Title Act*. This lack of guidance was compounded when Parliament removed s 82(2) which stipulated that 'the Court, in conducting proceedings, must take account of the cultural and customary concerns of Aboriginal and Torres Strait Islanders.' While the Federal Court has discretion under s 86 to 'receive into evidence the transcript of evidence in any other proceedings', beyond s 82 there is no obligation to accept oral tradition.[24] The reliability of oral evidence was a key concern of Justice Moynihan, the trial judge in the *Mabo* case, (who had represented Queensland against Aboriginal land rights in the 1982 *Koowarta* case, which decided international law supported Aboriginal rights). He 'was not impressed with the creditability of Eddie Mabo', and also expressed concern about other witnesses being 'extremely selective and distorting'

22 *Yorta Yorta v Victoria* (1998) [102]; Peter Sutton, *Native Title and the Descent of Rights*, National Native Title Tribunal, Perth, 1998, 86-87, citing Rod Hagen's anthropological report on the Yorta Yorta claim.

23 David Ritter, 'Whither the Historians? The Case for Historians in the Native Title Process', and Christine Choo and Shawn Hollbach, 'The Role of the Historian in Native Title Litigation' (1998/1999) 4 *Indigenous Law Bulletin* 4-8.

24 *Native Title Act* 1993 (Commonwealth) 47, 48. Olney states, 'the whole of the trial was conducted in a manner consistent with section 82 in its original form', and no objections were made to deciding the case according to the law then applying. This did not require the Court to be bound by the rules of evidence.

when relying partly on old written sources in order to reconstruct aspects of traditional culture.[25] Nevertheless Moynihan accepted oral tradition as significant evidence in the case.

In contrast the only weight Justice Olney gives to oral tradition is to say this evidence 'was in some respects both credible and compelling . . . particularly so with the more senior members of the applicant group.' But he immediately warns: 'Regrettably, this was not always so. In one instance two senior members of the claimant group were caught out telling deliberate lies, albeit about a relatively minor matter, but nevertheless incidents of that nature tend to cast a shadow over the other evidence of those witnesses.'[26] One would expect Justice Olney to apply similar standards to evaluate relevant written evidence, such as Curr's book *Recollections of Squatting in Victoria*, which supposedly is an account of the author's experiences near Tongala (as the Murray River was called by the original owners) between 1841 and 1851. Curr's book was not written until 35 years after the events he describes, and after Curr had been publicly ridiculed for his ignorance about Aborigines. This, according to Diane Barwick, 'obviously influenced the content of his books'. Curr, in 1875, solicited membership in the Board for Protection of Aborigines but resigned in 1883, when his book was published.[27] Justice Olney does not refer to these facts but instead implicitly accepts Curr's book as 'valuable' and as 'the most credible source of information concerning the traditional laws and customs' of the Yorta Yorta people at the time of the pastoralist invasion.[28] Justice Olney asserts that Curr 'generally enjoyed a good relationship with the indigenous people,' despite noting that 'on establishing an out station on the northern side of the Murray [Curr] had his shepherds attacked and sheep driven off.'[29] Curr himself recalls that 'from

---

25 Jeremy Beckett, 'The Murray Island Land Case' (1995) 6 *The Australian Journal of Anthropology* 27; Nonie Sharp, *No Ordinary Judgment* (1996) 168. Olney's statement that proving facts in *Mabo No 2* 'was relatively straight forward' suggests lack of familiarity with the detailed determinations of fact made by Moynihan, on which the second High Court case was based.

26 *Yorta Yorta v Victoria* (1998) [21]. This was disputed during the appeal hearing.

27 Barwick, 101-102, 103, 110. Barwick's 'detailed knowledge of the records of the Board for the Protection of Aborigines' is noted in Jan Critchett, *Untold Stories: Memories and Lives of Victorian Kooris* (1998) 49.

28 *Yorta Yorta v Victoria* (1998) [53], [106].

29 Ibid [34].

the very beginning I kept my party armed, and insisted on the shepherds carrying guns and keeping them in a serviceable state' saying, 'in this course I persisted for several years'. He recollects that he 'constantly' thought the Aborigines 'reminded me of children', but also 'gradually' came to believe that 'notwithstanding many differences between the Black and white man, their sympathies, likes and dislikes were very much what ours would have been if similarly situated; so that *a very limited experience* enabled both parties to understand and appreciate the position of the other.'[30] Whilst Henry Reynolds has suggested that Curr 'wrote the best overview of frontier conflict'[31] that does not mean that he had a reliable knowledge of Aboriginal culture.

When summarising all the evidence presented to the Court, Justice Olney does not specifically evaluate Curr's recollections, although later he does note that respondents in the case relied 'heavily on Curr's conclusions in limiting the area which in his day was occupied by those from whom the applicants claim descent.' Olney merely states that contemporary scholars who have analysed differences between Curr's statements and the records kept in the 1840s by G.A. Robinson, then Chief Protector of Aborigines in Victoria, 'have come to conflicting conclusions.' Justice Olney admits that he has 'derived little assistance from the testimony of the various experts who have given evidence in this proceeding and this [is] because *apart from the recorded observations of Curr and Robinson*, much of the evidence was based on speculation.'[32] In this statement, Justice Olney erroneously equates the method by which Curr and Robinson created their works. In fact Curr, unlike Robinson, did not write contemporaneous notes of what he saw. Robinson 'made no attempt to collate or interpret' the 'many details' that he recorded in his journal. Rather than valuing Robinson's method as an indication of factual accuracy and impartiality, Justice Olney states: 'much of what remains is extremely hard to decipher'. Justice Olney presumes that 'Curr on the other hand remained in the general area of his pastoral holdings for about 10 years' and 'clearly

30 Curr, 52-53 [Emphasis added]. *Cf.* Bain Attwood, *The Making of the Aborigines* (1989) 86, who quotes Curr from the 1877 Victorian Royal Commission on the Aborigines saying 'we must remember that the views and habits of mind of the blacks are unlike ours, and cannot entirely assimilate to ours for generations.'

31 Henry Reynolds, *Dispossession: Black Australians and White Invaders* (1989) 25.

32 *Yorta Yorta v Victoria* (1998) [54] [Emphasis added].

established a degree of rapport with the local Aboriginal people.' Justice Olney ignores Curr's capacity for embellishment of his recollections, a common human trait that Justice Olney, in relation to the testimony of 'several of the more articulate younger witnesses', criticises as weakening the reliability of evidence.[33] After emphatically stating his acceptance of Curr's work as credible, and ruling that an 'oral tradition passed down through many generations extending over a period in excess of two hundred years' merited 'less weight', Justice Olney acknowledges one problem with Curr's writings: 'Curr himself was not averse to a degree of speculation and to the extent that he indulged in that practice his opinion should not be accorded any weight but his *record* of his own observations and of what he was told by his Aboriginal informants, must be regarded seriously.'[34] Once more Justice Olney obscures the difference between a contemporaneous record and Curr's recollections which in addition involve speculation (for example, Curr presumes that a boomerang is an Aboriginal variation of an Ethiopian weapon).[35] Without contemporaneous records, it cannot be assumed that Curr recalled what he had actually seen nor presumed that he knew the cultural meanings of his observations.

Curr's credibility as a witness of evidence is highly suspect according to the research of Dr Marie Fels, who was in fact called by the State of Victoria as one of two expert historians in this case. In a book published in 1988 Fels examines an event involving H.E.P. Dana, the Commandant of the Port Phillip District Native Police from 1842 to 1852, who visited Curr's station on the Murray in January 1843. Curr claims in his *Recollections* to have a 'perfect memory' of a raid by Dana to the Moira Lakes to capture Aborigines who had taken 200 sheep and a gun from Curr's shepherds. His story has 'himself as the impartial witness of the events,' then later the 'saviour of the victim', an Aboriginal bystander named Old Warri, who was chained and then sent to Melbourne after Curr had told him he would be hanged. Curr downplays the significance of the raid, in which Dana was injured by a spear and shots were fired after the Aborigines had been lured into a trap by Curr–'a fact', Fels notes, 'that

33 Ibid [53] [21].

34 Ibid [106] [Emphasis added].

35 Geoffrey Blainey, *Triumph of the Nomads* (1975) 35-6 mocks this derivation: 'In his vigorous search for evidence Curr reflected the belief that human history was short and that primitive people and their language and skills were mummified.'

Curr elected to omit in his account' as well as failing to record that the Aborigines successfully resisted hand to hand fighting. According to Fels, 'Curr certainly did not understand why Dana left his black troopers at' Curr's station and took only one of his own troopers and a border police corporal on the raid. The reason, Fels explains, 'was social danger, and perhaps spiritual and emotional danger, for [native police] in a possible conflict with anyone in the relative-friend category, and Dana knew it and averted it by leaving them out of the action.' That Curr did not understand this basic cultural fact of Aboriginal life after squatting in the area for over a year indicates that he neither understood nor appreciated what traditional customs were. Fels suggests that Curr's story of himself rescuing the unfortunate Old Warri, who was gaoled in Melbourne for three months, is false; in fact, Old Warri was rescued by William Thomas, Assistant Protector for Aborigines. Evidence of Curr's errors and embellishments, particularly his contradiction of 'contemporary reports', makes Fels conclude that Curr's 'widely available' book does not warrant its reputation as 'almost a sacred text'. In 1988 Fels identified Curr's statements as fanciful rather than factual, noting Curr's 'frequent comparisons of his own situation with situations described in classical literature.' As a result, she concluded Curr's book 'is not to be relied [upon]. . . for its accuracy of fact or interpretation.'[36] Ten years later, Olney, a Federal court judge, relies on Curr's book entirely in his judgment.

There are no less than seventeen points in Justice Olney's judgment where Curr's book is quoted. For the crucial section of the judgment concerning the Yorta Yorta lands and traditional laws and customs of the Yorta Yorta, Curr is virtually Justice Olney's sole source. His treatment of Curr's book as evidence conflicts with his statement that: 'None of the persons whose original observations and records are relied upon could be called to give evidence and accordingly no assessment can be made of the credibility of the primary material.' He presumed the Yorta Yorta claimants to have a 'suspect' understanding of their original lands either because they did not include all claimed areas in a previous High Court writ, or because European records that remain have a narrower view.[37] For example, Olney quotes Methodist Missionary Daniel Matthews, who used names other than Moira to refer to two indigenous groups near the Moira Lakes but

36 Marie Hansen Fels, *Good Men and True: the Aboriginal Police of the Port Phillip District 1837-1853* (1988) 158-61.

37 *Yorta Yorta v Victoria* (1998) [62], [61].

concludes: 'By the time Matthews established Maloga and started keeping records, it is likely that Aboriginal people who were from the camp at Moira station would be described as of the Moira tribe simply because of their place of residence rather than because of any traditional tribal connection.'[38] Justice Olney implies that traditional identities were quickly lost, yet Matthews' own daughter Alma, born in 1880, recalled in her memoirs:

> The Murray tribes dwindled until as a child I remember well the head of the Moira Tribe, King Johnnie, sitting in his camp near my home at Maloga, where he lived and died with the remnant of the full-bloods . . . At Maloga there was an order controlled by King Johnnie among his tribe which my father always upheld, and today the descendants of his tribe are the strongest in the Aboriginal movement in Victoria.[39]

There is a striking difference between her assumption of continuity based on her experience living near these people and Justice Olney's assumption of a 'tide' of discontinuity that 'washed away' traditional laws and customs by 1881.[40] Indeed, Justice Olney's assumption conflicts with that of the former Minister for Aboriginal Affairs, Jeff Kennett, who in 1981 accepted:

> The point . . . is that all Aborigines are descended from a traditional situation. Whilst I agree . . . that most Aborigines no longer live a tribal lifestyle, *many may still be influenced by customs or beliefs from the past.*[41]

---

38 Ibid [69].

39 Quoted in Cato, 82: the author notes (83) that the Methodist missionary tried to stop Aboriginal people holding corroboree and preserving ancient kinship laws, but Mary Edwards (who was born and raised at Cummeragunja Aboriginal Station before marrying Norman Clarke from Framlingham Aboriginal community at Echuca in 1910) recalls of Cummeragunja (which replaced Maloga in 1889) that 'we had a big corroboree there once.' (Interviewed by Jan Critchet, *Untold Stories* 8.)

40 *Yorta Yorta v Victoria* (1998) [129]. In a historical review Olney notes that many Aborigines 'resented moves by Matthews in the 1870s to limit traditional ceremonial activity and the sanctions imposed, such as loss of rations, if people failed to attend Christian services' (*Yorta Yorta v Victoria* (1998) [40]) but he does not attempt to relate this to his assertion that traditional laws and customs ceased by 1881.

41 Submission No. 224 (19th March 1981) from Hon J. Kennett MLA, Minister for Aboriginal Affairs, to The Law Reform Commission's report into *The*

The implication of Kennett's statement was that the Australian legal system needed to accommodate itself to the reality of continuity between past and present customs in modern Aborigines' lives. That was not done either by Justice Olney or the Victorian Government, that, while persisting with mediation talks longer than the NSW Government, nonetheless assumed every native title right had been swept away.

DETERMINING TRADITIONAL LAWS AND CUSTOMS

This negative approach to discovering native title is expressed tendentiously in the section of Justice Olney's judgment titled 'Traditional Laws and Customs', where long quotations from Curr's book follow the claim that, because of his 'proximity' to the original owners, 'it is reasonable to infer that Curr's observations as *recorded* in his writings *reflect* the life and culture of these [owners]'[42]. Given the unreliability of Curr's book as a documentary source, outlined above, the question of whether these quotations are admissible evidence according to Australian law is a moot point. The 1986 Report of the Australian Law Reform Commission into *The Recognition of Aboriginal Customary Laws* carefully considered 'whether it is possible to qualify as an expert [merely] by reason of experience of a traditional community', noting that if 'to some extent this is done out of necessity' since 'no one [is] available with formal expertise in relation to a particular community', in 'such cases a more searching scrutiny of the nature and depth of the experience is likely to be required *before attaching weight to the evidence.*' This Report noted regarding Aboriginal culture that 'observation without explanation is of limited value: in matters of culture, tradition and customary law it is *the explanations and beliefs of the participants (their 'internal law') which give form and meaning to their actions*'[43]. Justice Olney assumes not only

---

Recognition of Aboriginal Customary Laws (1986) Vol 1, 93 [125] [Emphasis added].

42 *Yorta Yorta v Victoria* (1998) [108] [Emphasis added].

43 *Recognition of Aboriginal Customary Laws* (1986) Vol. 1, 470, 472 [632], [634] [Emphasis added]; (the phrases 'internal law' is from the scholar H.L.A. Hart), concluding that in civil cases 'the lack of admissible evidence to support opinion evidence based on hearsay will usually go to weight rather than admissibility.' Olney (*Yorta Yorta v Victoria* (1998) [53]) simply says 'neither Curr nor Robinson had any special qualifications or training that fitted them for the task of recording or interpreting the information they acquired about the Aboriginal people with

that his quotations of Curr's book are admissible, but also that presenting such quotations with little analysis gives Curr's purported observations weight as evidence.

The quotations that Justice Olney selects from Curr's book can be summarised briefly as a list of what Curr claimed to be 'primitive' customs, memories of observations after 'some five-and-thirty years only have passed' when 'Blacks, reeds, and bell-birds are gone.'[44] First, individuals and families had particular rights to land which 'were little insisted on' within the tribe, although defended against any others. Second, men had absolute authority within the family while 'thoroughly submissive to custom'. Third, jealousy was the main cause of disputes, resolved by ritual spearing. Fourth, there was no conscription but a tribe quickly formed alliances with neighbouring groups 'for war purposes'. Fifth, use of food was completely without any thought for conservation, 'like the beasts of the forest' for whom 'if anything was left for Tuesday, it was merely that they had been unable to consume it on Monday', so 'they never spared a young animal with a view to its growing bigger.' Sixth, there was limited sharing of game caught. Seventh, the 'mode of burial had nothing remarkable about it' bar emu feathers. Such is the banality and simplicity of Curr's 'evidence' that even Justice Olney admits this list is 'not intended to be a comprehensive survey of the laws and customs' of the original owners observed by Curr.[45] The superficiality of Curr's view of indigenous customary law can be highlighted with regard to the fifth point, which relates directly to the key concerns of the Yorta Yorta claimants, who told the Parliamentary Joint Committee on Native Title that: 'We say that the reason we have put in our native title claim is that

---

whom they made contact'. Olney's statement inappropriately equates the two men's abilities since Robinson had extensive experience with indigenous peoples in Tasmania whereas Curr, whose father was a prominent pastoralist in the war against these peoples, was educated in Britain and France before returning to Australia as a squatter.

44 Curr, 82, claims 'to remember with regret the primitive scene, the Black with his fishing canoe, the silence, and the gum-trees.' By the 1920s, if not before, however, missionary children at Cummeragunja 'called the Aborigines 'the dark people'. They liked to be called the dark people rather than the black people, and we never call them black, we always called them the dark folk.' (Alan Burrage, in Bain Attwood, Winifred Burrage, Alan Burrage and Elsie Stokie, *A life Together, A Life Apart* (1994) 102).

45 *Yorta Yorta v Victoria* (1998) [111]-[117].

we are very concerned about our cultural heritage, and we are very concerned about the environmental impacts.'[46] Curr's claim to have observed a lack of conservation is based not on accurate observation, but is rather a deduction from what he imagined the hunter-gather mindset to be. When quoting an isolated paragraph about hunting and gathering from Curr's *Recollections*, Justice Olney omits a key part of a sentence in which Curr states, as far as he is aware, a lack of conservation characterises 'the whole aboriginal population (notwithstanding what Captain Grey asserts to the contrary in connection with the Blacks of Western Australia)'. This purported observation indicates Curr's disdain for the 'primitive'. The only direct 'recollection' that Curr gives to show the original owners 'were very wasteful' of food, which 'was plentiful', is to say he 'often' saw them 'land large quantities of fish with their nets and leave all the small ones to die within a yard of the water.'[47] Justice Olney uses this single assertion by Curr to rule that fishing today by Yorta Yorta of 'only such food as is necessary for immediate consumption . . . cannot be regarded as the continuation of a traditional custom.'[48] The weight of assumption made by Justice Olney in favour of one written source, Curr's *Recollections*, disregards other relevant evidence disputing its credibility.

The colonial caricature of Yorta Yorta custom reconstructed by Curr forms an essential core of Justice Olney's judgement, without which his claim that traditional laws and customs had 'expired' by 1881 (before Curr's book was published) would have no reference point. Curr's old clichés provide the rhetoric for Justice Olney's rejection of any possibility of continuing native title rights:

> The evidence is silent concerning the continued observance in Matthews' time of those aspects of traditional lifestyle to

46 Monica Morgan, in Hansard 2/10/96, NT 2933. She continued: 'We have been marginalised for such a long time: give us a chance to be able to come in and have a say on those things before you cut off that option before it has a chance to progress any further.'

47 Curr, 122; Olney, [115], quotes this passage from 263 of the 1883 edition. *Cf.* Pamela Lukin Watson, *Frontier Lands and Pioneer Legends: How pastoralists gained Karuwali land* (1998) 84: 'Curr composed a set of 83 questions about tribal life–some of them multiple . . . only about three of the 83 dealt with food, and there was none relating to what is now called 'resource management'.

48 *Yorta Yorta v Victoria* (1998) [123].

> which reference is made in the passages quoted from Curr. Whether the former territorial areas of the various tribal groups were still recognised and protected as described by Curr is not something upon which there is any evidence. What the evidence does demonstrate is that the land on either side of the Murray had been taken up for pastoral purposes and that there had been both severe dislocation of the indigenous population and a considerable reduction in its numbers due to disease. Furthermore, there is no evidence to suggest that either Edward Walker or Kitty Atkinson/Cooper [ancestors of many Yorta Yorta claimants], or their immediate descendants continued to acknowledge the traditional laws or observe the traditional customs of their forebears in relation to land.[49]

This passage from Justice Olney's judgment indicates he has not only accepted Curr's book as evidence but also used it to discount other relevant sources. Curr's *Recollections*, which various specialist scholars have shown to be unreliable, in the judgment is unquestioningly accepted as a reliable chronicle not just of a lone squatter but also of a lost civilization.

The poverty of evidence, on which Justice Olney bases his ruling, is a result of his lack of critical interpretation of real evidence. Justice Olney claims an 'absence of evidence of continued observance of traditional laws and customs in the period after the establishment of Maloga', a statement of fact that requires more proof than Curr's line: 'Blacks, reeds, and bell-birds are gone.'[50] In the early 1860s Matthews got to know some of the 'hundreds of Aborigines still living about the Barmah Forest and Moira Lakes, supporting themselves on native game as well as handouts from the station homesteads.' As he left an Aboriginal camp after giving sweets to some children in February 1865 he saw this scene: 'When I left about 30 or 40 Blacks were sitting down on the ground, being addressed by one of the tribe. I ascertained from one of them that it was a discussion on some point of law between two tribes in which the honour of one was being impeached. As in our own courts, hand-swearing seemed to be indulged

---

49 Ibid [118].

50 Ibid [119]; Curr, 82. Olney does not quote this phrase of Curr's but it defines his ruling.

in.'[51] Cato claims that Matthews 'always got on well with the Old People, the original inhabitants of the land', but she notes that once 'some of the Old Men threatened to burn down the Mission' when he 'insisted on a marriage taking place which was against the ancient kinship laws'. She also says, with the younger generation Matthews 'had more trouble', being forced to get white contractors from Echuca 'to fence in the Reserve' because 'the Maloga men who had contracted to do the work simply walked off and went to play cricket'. Matthews stayed with Maloga after the NSW Government withdrew support in 1888. In 1892 near Moira Lakes he 'found eighteen Blacks fishing along the banks of the river; living in rude camps; earning a precarious livelihood;' in his view they were 'drifting back into dissipated and immoral lives' with even 'the children getting wild and vicious.'[52] This hardly constitutes an 'absence of evidence of continued observance of traditional laws and customs in the period after the establishment of Maloga'.

DETERMINING NATIVE TITLE

The issue of how to determine what specific traditional laws and customs have been handed down to the Yorta Yorta claimants from their old people is a basic question required for any determination of native title, implied by s 225 of the amended *Native Title Act*. This says the Court must first determine who holds native title, then 'the nature and extent of the native title rights and interests in relation to the determination area', then what other interests exist in relation to the same area, then how these different interests interact, then whether native title rights and interests to land which is not covered by 'non-exclusive' leases 'confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.'[53] The Yorta Yorta claimants sought: legal

51 Cato, 6, 20-21; Olney refers to Cato only concerning genealogies and the 1881 Land Petition. Cato, 35-36, refers to Curr as someone who 'liked the Aborigines, became interested in and recorded many of their customs, including the maloga (sandhill) above the reach of floods.' Yet the description of burial practices quoted by Olney from Curr is, apart from the emu feathers, no different than that recorded by Matthews, except for the contrast that Matthews gives the process a human dimension, with careful attention to time and silence before burial, followed by 'a wave of bitter lamentation' (Cato, 28, 69, 80), something that Curr ignores.

52 Cato, 83-83, 163, 167, 209.

53 *Yorta Yorta v Victoria* (1998) [16].

confirmation by Australian law of their 'rights to possession, occupation use and enjoyment of the determination area, the waters and natural resources, to the exclusion of all others;' as well as having this ownership recognised 'according to traditional law and custom' and a number of related specific rights, including participation 'to the fullest extent practicable' in government decision-making about access to their claimed lands and waters; access and occupation of this area; use and enjoyment of it for various purposes including gathering food, medicines, conducting ceremonies and education; and lastly 'the right to protect places and areas of importance in and on the determination area and the waters.'[54] Instead of attempting to define the communal native title rights which had been passed down to the Yorta Yorta claimants, or more properly allowing them to determine this following the basic principle decided in *Mabo No 2*, Justice Olney denied their identity. In turn, Yorta Yorta claimants accused the Federal Court judge of practicing (or at least sanctioning) 'genocide', by denying the integrity of whatever laws and customs they have retained from their ancestors.[55] Justice Olney might have found that some traditional laws and customs had survived in an adapted form, but instead stated that Australian law currently does not recognise this. He denies any continuing connection of the Yorta Yorta claimants with their ancestors' culture, without examining their oral tradition.

Justice Olney mentions the 'current beliefs and practices of the claimant group' only to compare them with Curr's recollections. He implies that any Yorta Yorta cultural adaptation is unworthy of protection as a basis for native title, saying that despite 'the genuine efforts of members of the

54 Ibid [11], noting that the claimed area of 'communal native title' was modified after the passing of the Howard-Harradine compromise to exclude all leases now called 'exclusive' by Parliament retrospectively.

55 *The Weekend Australian*, December 19th - 20th 1998, 11, quoting Monica Morgan. At international law genocide is an act 'committed with intent to destroy, in whole or in part, a national, ethnical, racial religious group, as such', with genocidal acts being: killing; causing serious harm; inflicting conditions aimed to destroy the group, wholly or partly; preventing births; and forcibly transferring children to another group. *Bringing Them Home: National Enquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) 270. The issue of whether Australian law can ignore the international genocide is before the Federal Court in the joined cases of *Wadjularbinna Nulyarimma of the Gungalidda v Philip Thompson* and *Kevin Buzzacott v Robert Hill*.

claimant group to revive the lost culture of their ancestors, native title rights and interests once lost are not capable of revival'. This seems to mean that no indigenous culture can ever be revived. Justice Olney refers once in passing to the possibility of 'a more ready understanding and recognition of the importance of the culture of the indigenous people', but does not elaborate how, given this, native title can be deprived of any basis. His brief description of contemporary Yorta Yorta beliefs simply leaves out any reference to burial practices, except for dismissing as non-traditional the fact that reburials of skeletal remains stolen by some scientists in the past have 'been conducted since about 1984' in the claim area.[56] Regarding the Aboriginal practice of 'obtaining permission to enter upon or use the resources of the claim area', he again uses Curr to define 'the traditional position', before saying 'the evidence concerning current practices was not entirely consistent from one witness to the next', then dismissing the whole issue of access to claimed land as insignificant since 'no-one suggested that even the former practices extended to excluding non-Aboriginals.' He notes that a senior applicant who he views as 'a thoroughly honest gentleman and a credible witness' gave evidence of what 'he said were secret men's sites', but dismisses this, partly because the witness would not disclose the locations.[57] The practice of not disclosing secret sites to non-Aboriginals in the glare of court publicity has become a widespread indigenous tradition, clearly intended to keep sites from desecration, given the lack of adequate protection by Australian law.[58] Ironically, even where the

56 *Yorta Yorta v Victoria* (1998) [121], [128], [124]. Olney does not acknowledge that what he calls 'the scientific examination' of skeletal remains was really a practice not only of removing but stealing.

57 Ibid [126], [127]. Olney dismissed the evidence of Colin Walker, a Site Officer with the Yorta Yorta Aboriginal Land Council, saying he was 'prone to avoid direct answers to straightforward questions', an excuse often used by judicial officers when a particular cross-examination of Aborigines appears meaningless. Walker recalls an uncle showing him a burial site, and says in his days at Cummeragunja Sunday School 'if you started doing anything in the aboriginal way they'd say the devil would get you. So it sort of broke our spirit, and the old people were broken and they didn't pass anything on to us. All they passed on to us was gathering foods and what to eat and how to hunt.' The *Native Title Act* s 223 (2) specifies that hunting and gathering and fishing rights and interests are specifically included within the meaning of communal native title.

58 Secrecy in legal proceedings is not peculiar to Aboriginal people, although this was largely ignored in public comment about Kumarangk near the mouth of the

evidence of a Yorta Yorta witness who Justice Olney accepted as credible established a continuing tradition, he refused to draw conclusions from it because the witness did not renounce tradition by talking freely about sacred sites. The claimants were rejected for being both non-traditional and also too traditional. In this case, Justice Olney uses the word 'traditional' dismissively, rather than coherently.

Justice Olney's assumption of an *a priori* division between 'traditional' and 'settled' Aboriginal peoples, separated by a tsunami-like 'tide of history' that has destroyed the latter but not yet reached the former, is spurious.[59] It was common in the days of the white Australia policy but has now been criticised for well over 20 years.[60] The main cultural divide is between diverse indigenous peoples and long waves of various migrants. Aboriginal and European historical perspectives are different. The latter focus is on white 'arrival as a turning point in Aboriginal history', yet the former tradition remembers instead ' a continuum of increasing contact with non-Aboriginal people', in which specific dates are less important than processes; by 'examining why people see the past differently, important insights into the past can be gained', thereby reaching an understanding which goes 'beyond dualistic views of a static, traditional Aboriginal life

---

Murray. See Deane Fergie, 'Whose sacred sites? Privilege in the Hindmarsh Island Bridge Debate' (1995) *Current Affairs Bulletin* 14-22.

59 Natasha Case, 'Tide of History or Tsunami?' (December-January 1998-99) *Indigenous Law Bulletin* Vol 4, 17-19.

60 Ramola Yardi and Geoffrey Stokes, 'Foundations for Reconciliation in social science: the political thought of C D Rowley', *Melbourne Journal of Politics* 25, (1998) 54-60; Jane M. Jacobs, 'The construction of identity' in Jeremy Beckett (ed), *Past and Present: the Construction of Aboriginality* (1988) 32; Howard Creamer, 'Aboriginality in New South Wales: beyond the image of cultureless outcasts' in ibid 206-207; Ian Keen, 'Introduction', *Being Black: Aboriginal Cultures in Settled Australia* (1998) 1. See also Dianne Barwick, 'Aborigines of Victoria' [originally published in B. Leach (ed), *The Aborigines Today* 1971], reprinted in ibid 27-32, particularly 29: 'In the modern Aboriginal subculture some elements of traditional culture survive: 'the old law' still operates to forbid first and second cousin marriages, and vestiges of the section system define marriage choices even more narrowly in remote districts; beliefs in certain spirits and harbingers of death are still passed on; some of the lore of herbal curing is still found useful; and some of the older mourning practices are still considered proper. . . . The Aboriginal subculture, developed in a rural setting, maintains certain features which are both adaptive extensions of traditional norms and typical characteristics of migratory workers.'

and changing non- Aboriginal life.'[61] Justice Olney's ruling remains trapped in this dualism, 30 years after it was exposed as false by Professor W.E.H. Stanner in the 1968 Boyer Lectures, when he reviewed failings of three decades before and wondered about present ones, saying 'one of them is a certain inability to grasp that on the evidence the aborigines have always been looking for two things: *a decent union of their lives with ours* but *on terms that let them preserve their own identity*, not their inclusion willy-nilly in our scheme of things and a fake identity, but development within *a new way of life that has the imprint of their own ideas.*'[62] This is an adequate appreciation of what the Yorta Yorta claimants were seeking. They were fully entitled to expect a fair and just consideration of their oral tradition, given the clear statement of all members of the High Court majority in *Mabo No 2* that native title is 'ascertained according to the laws and customs of the indigenous people who, *by those laws and customs*, have a connexion with the land.'[63]

CONCLUSION

The preamble to the *Native Title Act* says a 'special procedure' needs to be available to ensure 'the just and proper ascertainment of native title rights' with 'due regard to their unique character', deriving from oral custom and not statute.[64] It is questionable whether Justice Olney's method of regarding oral evidence as less reliable than written recollections meets that need. His approach is open to the criticism made by two senior Canadian archivists, who point out that 'even in societies in which the written word occupies a dominant place, documents tell us little about the groups further removed from power, or do so from a very biased point of view' (for example, Aboriginal peoples ...).[65] Justice Olney says the special

---

61 Richard Baker, *Land is Life: From bush to town - the story of the Yanyuwa people* (1999) 33, 206-207, 226; while non-European traders were distantly significant, 'from the Yanyuwa viewpoint, 'coming in' [to town] is the single most important event in their history', being a 'gradual process' that 'involved a multitude of factors with the issue of control over land playing a crucial part.' (159)

62 Professor W E H Stanner, *After the Dreaming: the 1968 Boyer Lectures* (1969) 27-28 [Emphasis added].

63 *Mabo v Queensland (No. 2),* (1992) 175 CLR 1, 3 [Emphasis added].

64 As quoted by McHugh J, cited by Kirby J in *Fejo and Another on behalf of the Larrakia People v Northern Territory and Anor* (1998) 156 ALR 742 n 84.

65 Jean-Pierre Wallot and Normand Fortier, 'Archival science and oral sources' in Robert Perks and Alistair Thomson (eds), *The Oral History Reader* (1998) 366.