

THE TIDE OF HISTORY OR A TRACE OF RACISM? THE YORTA YORTA NATIVE TITLE TRAGEDY¹

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The High Court's decision in the Yorta Yorta native title claim, handed down on 12 December 2002, ended the native title hopes of the Yorta Yorta people. In a 5-2 decision, the Court held that the Yorta Yorta people had "lost" their traditional laws and customs relating to the land, which "give rise to" native title. The Courts' interpretation of the Native Title Act to demand a continuity of practiced tradition amounts to a demand that Aboriginal people remain locked in unchanged pre-1788 cultural practices if they are to succeed in a native title claim.

Under the law of native title as constructed by the High Court in *Mabo* (no. 2) and the *Native Title Act 1993 (Cth)* (NTA), the "traditional laws and customs" of Indigenous claimant groups "give rise to" the unique form of landholding that is native title. In the *Yorta Yorta* determination, it was ruled that this connection with the land through traditional laws and customs needed to be continuous. The Yorta Yorta people were held to have failed to demonstrate the continuance of these laws and customs.

In this essay I will examine the case as each stage of its progress to the High Court, with particular attention on the courts' interpretation of the "tradition" requirements in the NTA. I will argue that the courts' interpretation of these requirements to demand a continuity of practiced tradition amounts to a demand that Aboriginal people remain locked in an unchanged pre-1788 definition of culture if they are to succeed in a native title claim. I will also examine international treaties for guidance as to a better approach that could be enshrined in Australian law.

Background: the Yorta Yorta people

It had been a long road to the final determination for the Yorta Yorta people. Their claim was among the first lodged after native title was constructed by the High Court (or, to use the terminology of the Court, "construed") in the *Mabo* case. When the claim was referred to the Federal Court by the Native Title Registrar in May 1995, it was the first native title case to go to trial in the Federal Court.² Between October 1996 and November 1998 oral evidence was taken from 201 witnesses during a hearing that lasted

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² *Members of the Yorta Yorta Community v The State of Victoria* [1998] 1606 FCA (18 December 1998) at [12].

114 days.³ The claim was first defeated by Olney J in the Federal Court in 1996, and again by the Full Federal Court on appeal in 2000.

The land the Yorta Yorta people call home is the area now known as the Murray-Goulburn region. This area has been reported as being one of the most densely populated areas prior to colonisation.⁴ The work of Wayne Atkinson, a Yorta Yorta man, provides an excellent account of the long struggle of the Yorta Yorta for justice after they were dispossessed of their land. Atkinson writes that the abundance of mounds evidencing former campsites, fish trap systems, and middens built up of shellfish indicate that the area was heavily populated by tribal groups.⁵ The population of the Yorta Yorta people before colonisation has been estimated to be about 2,400.⁶ But the Yorta Yorta people's enjoyment of a rich life in an abundant environment changed dramatically with the arrival of the first Europeans. The first generation of colonisation saw the Yorta Yorta population reduced by 84%.⁷ According to Atkinson, his people fought a "sustained resistance" against the invasion of their land, but were "dispossessed of their tribal lands and left to eke out an existence on the edges of the European settlements as remnant tribal groups."⁸ By 1874, most of the remaining population had been relocated, along with people from other groups in the surrounding areas, to the Maloga Mission on the NSW side of the Murray. Following the closure of Maloga in 1889 the Yorta Yorta relocated to Cummeragunja,⁹ and according to Atkinson "were able to regroup following the destruction."¹⁰

The Yorta Yorta people have not been shy of political activism, and have figured significantly in the Aboriginal political movements of last century (and today). Part of this has been numerous attempts to claim land or compensation for its loss. Atkinson writes that "as early as 1860 members of the Yorta Yorta demanded compensation from the Victorian authorities for the destruction of their natural fishing areas by paddle steamers." This shows that "as early as 1860 the Yorta Yorta ancestors were well aware of their indigenous rights and were quick to exercise them."¹¹ Between 1960 and the lodgement of the native title claim in 1993, there have been about 17 separate attempts by the Yorta Yorta to claim land and compensation. These struggles have succeeded in securing only the return of 1,200 acres of land that formed around a third of the former Cummeragunja Reserve.¹² This land was handed back as inalienable freehold title to the Yorta Yorta Land Council in 1983 by the NSW

³ *Members of the Yorta Yorta Community v Victoria* [2002] HCA 58 at [4].

⁴ Wayne Atkinson, "Yorta Yorta struggle for justice continues", published at <http://home.vicnet.net.au/~aar/yorta.htm>

⁵ *Ibid.*

⁶ N Tindale, 1974, *Aboriginal Tribes of Australia*, University of California, Berkeley.

⁷ Atkinson, *Supra* at 4.

⁸ Atkinson, *Ibid.*

⁹ [1998] FCA 1606 (18 December 1998) at [41-45].

¹⁰ Atkinson, *Supra* at 4.

¹¹ Atkinson, *Ibid.*

¹² Wayne Atkinson, 1985, *A Chronological History of Yorta Yorta Peoples Struggles for Land and Compensation*, unpublished essay, LaTrobe University.

Government under the *Land Rights Act (NSW)*, but represents “a tenth of one per cent” of the Yorta Yorta people’s traditional lands.¹³

In this native title claim, the Yorta Yorta people claimed an area of about 2,000 square kilometres around the Murray River in Victoria and NSW. More than 500 respondents were joined to the claim, including three States.

Native title as defined by the *Native Title Act*

As was held in *WA v Ward*,¹⁴ the *Native Title Act 1993* is at the heart of native title litigation. However, the only place that the concept of “native title” is defined in the *Act* is in s 223(1), and the definition is rather general: ‘the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) The rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) The Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) The rights and interests are recognised by the common law of Australia.’

As the majority judges in the High Court appeal stated, the *Yorta Yorta* case focused on the proper construction of this definition.¹⁵ It is the rather circular par (c) that is the operative provision: native title exists to the extent that it is recognised by the common law. We should note for later that all of the section is framed in the present tense.

The native title claims process

Native title claimants must discharge three burdens of proof, in relation to the land they wish to claim:

1. That they are, by descent, the true traditional owners of an area;
2. That their traditional laws and customs form a quasi-proprietorial relationship with the land and that they can give rise to native title rights; and
3. That these rights are capable of being recognised by the common law.

Various forms of evidence are used to discharge this onus, including oral evidence and stories, documentary evidence, the performance of traditional rituals or dances, and sometimes a visit to the land in question. Aside from extensive testimony from traditional owners, a claim will usually include maps and extensive written evidence from *experts*: reports from a genealogist, a

¹³ Atkinson, 1985.

¹⁴ [2002] HCA 28 (8 August 2002).

¹⁵ [2002] HCA 58, at [4], per Gleeson CJ, Gummow, McHugh, Hayne and Callinan JJ.

linguist, a historian and an anthropologist.¹⁶ Very often these experts will be non-indigenous, but claimants must prove the existence of their traditional laws and customs to the Court as a matter of fact, and the written reports of experts – particularly anthropologists – are seen by the courts as having significant probative value when it comes to evidencing facts at issue in the claim.¹⁷

The process of claiming native title can be an incredibly invasive one for Aboriginal people. Cultural restrictions on knowledge often form a significant part of the culture that surrounds land and its custody for many Indigenous peoples, and the process of proving “traditional laws and customs in relation to the land” can go into areas of high sensitivity.¹⁸ The significance of sites and the responsibility many Aboriginal people hold to care for their country is bound up in complex rules as to who may do, and know, different things.¹⁹ In this context, it should be seen that “requiring Aboriginal people to make restricted knowledge public, either to non-Aboriginal people or to other Aboriginal people, undermines the complex web of traditional social relationships.”²⁰

The conflict between the demands on Aboriginal people to display cultural laws to an Australian court was particularly evident in the Hindmarsh Island Bridge saga. This infamous case concerned an attempt to invoke the *Aboriginal and Torres Strait Islander Heritage Protection Act* in order to prevent a bridge being built to Hindmarsh Island off South Australia. The Ngarrindjeri people refused to publicise the cultural practices that made a certain site sacred, beyond saying that it was a place for “women’s business” which must remain secret from men. Their claim was ridiculed – they were accused of making up the “women’s business,” and ultimately the Federal Coalition government passed special legislation to prevent the use of the *Heritage Act* in that area.

So when considering the evidentiary demands placed on Aboriginal people in native title claims, and the importance to a claim of open and demonstrative descriptions of cultural traditions relating to the land, it should be remembered that this is often a long way from the method in which these cultural traditions are practised. It could be argued that requiring people to reveal the intimate details of some of the most sacred aspects of their culture is to force them to package cultural laws into a kind of historical product, *this is*

¹⁶ For example the claim made by Trevor John Close on behalf of the Githabul people, registered with the Federal Court (information from personal conversations). See also National Native Title Tribunal, *Procedures for Applications for Native Title Determination and Compensation*, 1996, available at <http://www.nntt.gov.au>

¹⁷ For a fairly comprehensive discussion of issues that arise in this process, see J Fingleton and J Finlayson (eds), *Anthropology in the Native Title Era. Proceedings of a workshop conducted by the Australian Anthropological Society and the Native Title Research Unit*, AIATSIS, 1995.

¹⁸ For written documentation of these issues, see for example D Bell, “Sacred Sites: The Politics of Protection”, in Pearson and Langton (eds), *Aborigines, Land and Land Rights*, Australian Institute of Aboriginal Studies, 1983.

¹⁹ See for example H Morphy, “Now you understand: an analysis of the way Yolngu have used sacred knowledge to retain their autonomy”, in Pearson and Langton, (eds), *Aborigines, Land and Land Rights*, Australian Institute of Aboriginal Studies, 1983.

²⁰ E Evatt, “Respecting Customary Restrictions on Knowledge”, in *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

what we used to do. To do so would be to deny that such traditions are still active and vital, to treat the investigation like an autopsy, where nothing is sacred any longer. We might keep this in mind when analysing the *Yorta Yorta* determination.

The decision at first instance

In the Federal Court Olney J determined that native title did not exist in relation to the claim area as the claimants could not evidence a connection to the land in the relevant sense. In a notorious judgment, he ruled that due to the impact of British settlement, the Yorta Yorta people had been dispossessed of their land and their traditional laws and customs had been “washed away by the tide of history.”²¹ They had ceased to live according to such customs, and if they had regained it by now, the continuity of traditional custom had been broken.²² Further, the claimants had failed to demonstrate that they had continued to acknowledge their traditional laws and customs.

Olney J based his decision on a finding that between the time of colonisation and the present, and in the face of dispossession at the hands of Europeans, the Yorta Yorta people had effectively lost their traditional culture. Indeed, the learned justice managed to determine a date by when the traditional culture had been lost: it had occurred by 1881. This was the date when a number of Yorta Yorta people petitioned the NSW Governor for a grant of land, stating that they wished to “settle down to the more orderly habits of industry.”²³ This document was introduced by the claimants as evidence of an earlier assertion of a right to land, but was used by Olney J to indicate that they were no longer living in their traditional way.²⁴

Olney J preferred the written history of a white squatter and “amateur anthropologist,” Edward Curr, over the oral histories of the members of the claimant group: “The most credible source of information concerning the traditional laws and customs of the areas...is to be found in Curr’s writings.”²⁵ Olney J devoted many pages of his judgment to detailing writings from white anthropologists, historians and squatters, but devoted only a few paragraphs to commenting on or detailing the oral evidence given by Yorta Yorta elders. Unfortunately, counsel for the claimants did not tender a historian’s report as evidence, nor was a historian called as an expert witness for the claimants.²⁶ They let the oral evidence of the Yorta Yorta people stand as the evidence of traditional custom, and were evidentially unprepared for the extent to which this would be significant. It was on the evidence from Curr which the judge

²¹ This phrase comes from the judgment of Brennan J in *Mabo (no. 2)*. Olney J was fond of the phrase and used it several times.

²² [1998] FCA 1606 at [121].

²³ *Ibid* the petition is reproduced at [119].

²⁴ *Ibid* at [120].

²⁵ [1998] FCA 1606 at [106].

²⁶ See C Choo and M O’Connell, “Historical Narrative and Proof of Native Title”, in *Land, Rights, Laws: Issues of Native Title*, vol 2, issues paper no. 3, AIATSIS, 1999.

based his finding of a loss of traditional custom. For instance, Olney J seized on a discrepancy between evidence as to the collection of food:

‘It is said by a number of witnesses that consistent with traditional laws and customs it is their practice to take from the land and waters only such food as is necessary for immediate consumption. This practice, commendable as it is, is not one that, according to Curr’s observations, was adopted by the Aboriginal people with whom he came into contact and cannot be regarded as the continuation of a traditional custom.’²⁷

At each stage, the claimants’ assertions about traditions are held up against the writings of a squatter for verification.²⁸ Olney J went on to decide that the present day Yorta Yorta people’s engagement with government agencies over forest protection and management of the flow of the river are matters “about which the original inhabitants could have had no concern” and thus were not the exercise of traditional customs.²⁹ Olney J defeated the claim that the protection of forests and waters by invoking descriptions from Curr that many of the river red gums in the area had had canoes cut out of them. Therefore, Olney J ruled, the protection of trees cannot be said to be a traditional activity.³⁰

Olney J said that the Yorta Yorta people “had ceased to occupy the land in the relevant sense.” That is, the NTA’s requirement in s 223 that it is traditional laws and customs which give rise to native title. It was not occupation that was “lost,” but traditional culture. With this loss went the *continuity* of traditional connection to the land that Olney J decided was required under s 223. The Yorta Yorta people had ceased to be a community in the sense required by native title law, and they had ceased to practice relevant cultural connections with the land. His conclusion is worth including at length; it is itself a matter of historical record:

The facts in this case lead inevitably to the conclusion that before the end of the 19th century the ancestors through whom the claimants claim title had ceased to occupy their traditional lands in accordance with their traditional laws and customs. The tide of history has indeed washed away any real acknowledgement of their traditional laws and any real observance of their traditional customs.

On appeal to the Full Federal Court

The claimants argued on appeal that Olney J’s approach to ‘traditional laws and customs’ under s 223 of the *Native Title Act* was infected by an approach that demanded Aborigines be “frozen in time”, in that it ‘wrongly

²⁷ *Supra* at 22 at [123] and [128].

²⁸ We could also doubt whether Curr was writing in complete good faith: Curr’s commentaries reveal that he was a squatter who thought it fair to “purchase” an area of land from a Yorta Yorta teenager for the price of a stick of tobacco.

²⁹ *Supra* at 22 at [125].

³⁰ *Supra* at 22 at [122].

equated the existence of native title with the existence of a 'traditional society' or a 'traditional lifestyle.'³¹

By a two to one majority, the Court ruled that Olney J did not err in his construction of native title, and that it was open to him to conclude that continuous practice of traditions in relation to land must necessarily be evidenced in order to claim native title. Branson and Katz JJ held that the definition of 'native title' in s 223(1) of the *Act* demanded that a claimant community:

'...has *continuously* since the acquisition of sovereignty by the Crown been an identifiable community the members of which, under its traditional laws observed and traditional customs practised, possessed interests in the relevant land?'³²

All three judges accepted that the traditional laws and customs that create native title may adapt and change in the period colonisation without native title rights necessarily being lost as a result,³³ and the majority rejected a strict approach to tracing the continuity of traditional laws and customs. They ruled, though, that it was open to Olney J to find that in the period between 1788 and lodging the claim, there was a period when the Yorta Yorta had "ceased to be a traditional Aboriginal community." At this time, native title expired, and could not be revived.³⁴

In the minority, Black CJ ruled that the approach taken by Olney J and approved by justices Branson and Katz failed to allow for adaptation and change in traditional law and customs in response to colonisation, and would have allowed the appeal.³⁵

This case shows the extent to which the construction of native title depends intimately upon the approach to Aboriginal culture taken by each judge in question. Here, an opinion is elevated directly to a finding at law. Branson and Katz JJ were of the opinion that it is open to a judge in an Australian court to decide that traditional Indigenous culture has expired or been 'washed away.'

The High Court

Before the appeal reached the High Court, James Cockayne previewed the trajectories available to the law regarding native title:

Yorta Yorta provides two very different approaches to the concept of tradition [in native title]: one is based on an understanding of traditions as discrete, historical practices, the other on treating traditions as socio-legal orders. These approaches offer two very different possibilities for the development of native title: one, along a colonial path, and the other, on a more reconciliatory path.³⁶

³¹ *Yorta Yorta* (2001) 180 ALR 655, at 659, per Black J.

³² (2001) 110 FCR 244 at [108].

³³ (2001) 110 FCR 244 at [49] per Black CJ, [122] per Branson and Katz JJ.

³⁴ (2001) 110 FCR 244 [194], [202].

³⁵ (2001) 110 FCR 244 at [69]-[72].

³⁶ James Cockayne, "Members of the Yorta Yorta Aboriginal Community v Victoria: Indigenous and Colonial Traditions in Native Title, [2001] MULR 25.

There had been two controversial rulings that armed the appeal to the High Court. Firstly, that it was open to the trial judge to find that the traditional laws and customs were no longer exercised by the Yorta Yorta, and second, that a claim of native title requires a demonstration that the traditional laws and customs as currently practiced must be shown to be continuous since pre-contact days. So the definition of “traditional” had become the apparent heart of the case. On appeal to the High Court, the claimants pointed to the ruling in *Cth v Yarmirr*,³⁷ where it was held that the definition in s 223(1) of the *Native Title Act* is at the centre of such cases.³⁸ Therefore, they argued, the fact that s 223 as expressed entirely in the present tense means that traditional laws and customs in relation to native title are to be interpreted now, rather than with reference to pre-colonial days and requiring continuity since then.

This argument was received by Gaudron and Kirby JJ, who ruled that there was no requirement in s 223 of the *Act* for the practice of traditional customs to be operating continuously since colonisation. Indeed, they commented on the fact that communities “can disperse and regroup”³⁹ without causing the “expiry” of native title. The decision of Gaudron and Kirby JJ differed from the majority largely due to their application of the ordinary definition of “traditional”, in that it “imports a *sense* of continuity from the past,”⁴⁰ (emphasis added). The difference may be a subtle one, but it is vital. Tradition in this sense refers to customs that are handed down from generation to generation. The minority judges limited the significance of “continuity” to whether today’s practices can properly be said to “constitute acknowledgement of traditional laws and observance of traditional custom.”⁴¹ The continuity is one of substance, not one that must be measured against every year since 1788. Although laws and customs should be *traditional*, it is the practice today that is relevant:

What is required by ss 223(1)(a) and (b) of the Act is the acknowledgement of traditional laws and the observance of traditional customs by which particular Aboriginal or Torres Strait Islanders have a connection to the land and that they possess rights and interests in relation to that land under those laws and customs. There is nothing in that paragraph or any other part of the definition of “native title” or “native title rights and interests” which that “traditional connexion with the land ... [be] substantially maintained”.⁴²

The joint decision of Gleeson CJ, Gummow and Hayne JJ saw this differently. The majority judges declared that they could see the danger in demanding that a culture be frozen in pre-contact days for it to have contemporary relevance, but did not have difficulty demanding that traditional laws remain intact – continuous – in addition to their being *derived* from the

³⁷ *Commonwealth v Yarmirr* (2001) 75 ALJR 1582.

³⁸ The High Court would make this point even more strongly in *WA v Ward* [2002] HCA 28 (which was handed down after hearings in *Yorta Yorta* had finished).

³⁹ [2002] HCA 58 at [118].

⁴⁰ [2002] HCA 58 at [101].

⁴¹ [2002] HCA 58 at [111].

⁴² [2002] HCA 58 at [123].

time before colonisation. They argued that this is what was demanded by the unique nature of native title. Seeking to define the relevant definition of *tradition*, the judges performed an intricate separation of *customs* and *laws*.⁴³

To have the character of a law, they held, a custom must be a *normative system*, capable of controlling behaviour among a community. The majority recognised that this may not necessarily take a form recognisable “to the Australian property lawyer” but should not be judged negatively on this fact alone.⁴⁴ The majority took it upon themselves to distinguish between the *laws* and *customs* of a culture foreign to their own.

According to the majority judges, traditional culture is thus separable from traditional culture, and there is a higher onus placed on the traditionality of the normative system.⁴⁵ The relevance of the definition is that it goes to the application of s 223(1) of the NTA. While Gaudron and Kirby JJ gave the word “traditional” its “ordinary meaning” – derived from the past – the majority held that in the context of native title, something more is needed than for a normative system to simply be derived from the past. Gleeson CJ, Gummow and Hayne JJ demanded that for a system of laws and customs to satisfy s 223(1), it must be the normative system that is handed down through generations, and this necessitates continuity. There must be something more than the presence of culture or customs *derived from* the past:

... because the subject of consideration is rights or interests, the rules which together constitute the traditional laws acknowledged and traditional customs observed, and under which the rights or interests are said to be possessed, must be rules having normative content. Without that quality, there may be observable patterns of behaviour but not rights or interests in relation to land or waters.⁴⁶

According to the majority, as there was a break in the laws which constituted the community’s relationship to land, the society had ceased to be sufficiently traditional to sustain a claim. Apparently it is the laws which constitute a community, not the reverse. Thus Olney J’s findings that the Yorta Yorta had ceased to occupy the land according to traditional laws and customs were a decision that was open to him:

...they were findings that the society which had once observed traditional laws and customs had ceased to do so and, by ceasing to do so, no longer constituted the society out of which the traditional laws and customs sprang.⁴⁷

The reasoning of the majority is highly disturbing. It is barely an advance on Olney J’s infamous original ruling. *Yorta Yorta* shows quite explicitly that whether a judge can find traditional laws and customs that support a native title claim will to a large extent be determined by the method by which s/he goes looking for them. Two distinct points emerge: firstly, the manner in which a judge believes they may interpret history can determine the

⁴³ [2002] HCA 58 at [39–42].

⁴⁴ [2002] HCA 58 at [40].

⁴⁵ It has been suggested that this was simply a pedantic attempt to avoid criticism for demanding a culture be “frozen in time” – it is apparently not as bad to demand such of a system of law.

⁴⁶ [2002] HCA 58 at [42].

⁴⁷ [2002] HCA 58 at [95].

decisions which they believe are open to them in making a determination regarding native title. Lisa Strelein sees no need for subtlety:

The High Court's deference to the views of the trial judge in *Yorta Yorta* demonstrates the vagaries of an assessment based, to a significant degree, on the judge's perceptions of the group. The High Court has done little to guide the trial judge away from their pre-existing biases and prejudices in making such an assessment. Native title claimants must rely on the ability of a non-Indigenous judiciary to conceive the contemporary expressions of Indigenous identity, culture and law as consistent with a pre-sovereign normative system.⁴⁸

This is the difficulty with native title: the combination of a general definition of native title in s 223(1)(a) and (b) and the circularity of s 223 (c) combine to produce a body of law which can appear quite arbitrary. This arbitrariness is also present in the dissenting judgments of Gaudron J and Kirby J. The judges held that Olney J's determination that the traditional Yorta Yorta culture had been washed away by the tide of history may have been open to him:

That is a finding of fact and, although expressed in terms of a metaphor, unless it involves an error of law, that finding must lead to the conclusion that par (a) of the definition in s 223(1) of the Act has not been satisfied and, thus, that native title does not exist in the claim area.⁴⁹

However commendable these judges may be for their rigorous dissent, their methodology is disturbing. Native title concerns the intersection of two very different systems of law, and if it is to be more than tokenistic, such intersection demands mutual respect. I will return to this soon.

Secondly, hierarchies of evidence create a horrendous disadvantage for native title claimants. We see from *Yorta Yorta* that differing definitions of what counts as a "historical record" creates difference as to what will count as evidence of continuing laws and customs relating to the land. We see Olney J's preference for the work of white anthropologists in "historical records." In large part, this is a function of the vague and general wording by which native title is defined in the *Native Title Act*. It could be argued that the *Act* perpetuates the myth that native title has "always been there" but has only lately been spotted. So the manner in which it is seen determines wholly the extent to which it is allowed to exist. But the legislation cannot be held entirely responsible. A brutal assessment is that Olney J showed his preference for anyone white who had a pen. Sadly, the claimants' case could have been assisted were there less documentary evidence supporting their claim. But it is a strange onus to bear when a community is at once expected to be traditional, and also to have this documented by historians.

Against the standard of the words of historians, mainly Curr, Olney J measured the claims of the traditional owners, and disbelieved the indigenous

⁴⁸ L. Strelein, 2003, "Members of the Yorta Yorta Community v Victoria – comment", in *Land, Rights, Laws: Issues of Native Title*, issues paper vol 2 no. 21, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, p. 6.

⁴⁹ [2002] HCA 58 at [120].

people to the extent of any inconsistency.⁵⁰ A less harsh judgment is that after years of native title work in the Northern Territory, the learned justice had difficulty adapting to the fact that many Aboriginal people have adapted to white society to a greater extent than has been demanded of some Indigenous people in the Territory. Either way, this is a serious issue that should be addressed in the legislation.

There would be three easy ways to do this. The most obvious would be the insertion of a section 223 (4) or 223A that expressly provides words to the effect of:

223A: nothing in this section is to be taken to necessitate that native title claimants prove that their culture remains in the form it held pre-1788.

Alternately, the word “traditional” could be defined in the definitions section, in line with the sentiments of Gaudron and Kirby JJ: that tradition means “derived from the past and handed through generations”, rather than necessarily continuous.

A more far-reaching but popular solution would be to amend the *Acts Interpretation Act* so as to specifically provide that when interpreting legislation, courts are to give regard to international treaties to which Australia is a signatory.

For example, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) provides in Article 2:

States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races...

Article 5 of the CERD establishes the right of peoples of all races to equality before the law, including in relation to political rights, the right to own property, the right to inherit and the right to equal participation in cultural activities.⁵¹ However, there are differing interpretations of the nature of this equality. Australian courts have tended to prefer the “formal equality” interpretation (as informed the decision in *Gerhardy v Brown*⁵²) where people are treated the same irrespective of circumstances. The alternative is a model of “substantive equality,” where people may be treated differently according to an assessment of needs an attempt for equality of *outcomes*. This was the approach taken by Tanaka J in the *South West Africa* case in the International Court of Justice:

The principle of equality before the law does not mean the absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and

⁵⁰ See [1998] FCA 1606 at [123].

⁵¹ D Dick and M Donaldson, “The Compatibility of the amended *Native Title Act 1993* (Cth) with the UN Convention on the Elimination of All Forms of Racial Discrimination”, in *Land, Rights, Laws: Issues of Native Title*, Native Title Research Unit, AIATSIS, issues paper no. 29, 1999, p. 3.

⁵² (1985) 159 CLR 70.

unequal...to treat unequal matters differently according to their inequality is not only permitted but required.⁵³

If a notion of substantive equality were applied in the *Yorta Yorta* case greater allowance could have been made for the differing modes of historical narratives practiced by European Australians and by Indigenous Australians. Oral histories and documentary histories could have been placed on a more equal footing by being treated as different but of equal *value*. Olney J, and the majority of the High Court, however, preferred to demand that different cultures take an identical approach to the evidencing of history.

Similarly, treaties such as the International Covenant on Political and Civil Rights (ICCPR)⁵⁴ and the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (DRPBNERLM), contain provisions which do not require much interpretation for them to require that Australia prevent the unjust operation of land laws and improve the native title system. For instance, Article 27 of the International Covenant on Civil and Political Rights states:

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such shall not be denied the right, in community with other members of their group to enjoy their own culture, to profess and practice their own religion or to use their own language.

It can quite clearly be seen that in assuming the power to determine whether the Yorta Yorta people are actually practicing the culture that defines them, the Australian law is intervening in their ability to do so. If Australia is to live up to its international treaty obligations, the NTA should be interpreted in accordance with the ICCPR and Indigenous people be allowed to determine whether they are indeed practicing their own culture.

The DRPBNERLM is not as strong⁵⁵ as the UN Draft Declaration on the Rights of Indigenous Peoples,⁵⁶ which contains numerous provisions relevant to the case at hand: Art 3 enshrines the right of Indigenous peoples to self-determination, Art 4 protects political, social and cultural rights in a contemporary tense, Art 30 provides for the right to control the development of traditional lands. The most powerful provision of the Draft Declaration may be Article 12, which would enshrine the right to practice and revitalise cultural traditions. Obviously this provision could ensure that cultural traditions are interpreted in a contemporary as well as historical sense. Quite how this would impact on native title is unclear, though, as *Yorta Yorta* concerned the expiry of native title due to a lack of evidence of continuity of tradition, and the Court has made clear elsewhere that once expired native title cannot be revived.⁵⁷ At

⁵³ For a detailed discussion of the concept of equality see the dissenting opinion of Tanaka, J. in the South West Africa Cases Second Phase), 1966 - reprinted in Brownlie 1922, 568-98: *South West Africa Case*, International Court of Justice.

⁵⁴ UN Doc A/6316 (1966), 99UNTS 171.

⁵⁵ See ATSIC, "An Analysis of the United Nations Draft Declaration on the Rights of Indigenous Peoples", 1999, at www.atsic.gov.au/issues/indigenous_rights/.

⁵⁶ United Nations, *Draft Declaration on the Rights of Indigenous Peoples as Agreed Upon by the Members of the Working Group at its Eleventh Session*, UN Doc E/CN.4/Sub.2/1994/2/Add.1, 1993.

⁵⁷ See *WA v Ward*, [2002] HCA 28 and *Wilson v Anderson* [2002] HCA 29.

any rate, the Declaration is still at draft stage, and given the current reluctance of the Australian government to engage with the United Nations, particularly on issues concerning Indigenous peoples, we cannot treat it as a law yet.

Various international provisions regarding self-determination⁵⁸ could be held against the *Yorta Yorta* case to show that in defining *culture* the Australian courts have done quite badly by accepted international standards. The right to self-determination, broadly interpreted, would necessarily include the right for a culture to develop through time without losing its status as an Indigenous culture rooted in tradition.

Much of the world is attempting to move on from the dark stain of colonialism, and move on in such a way as to recognise past wrongs. Unfortunately, and despite pleasant words expressed to the contrary, the Australian law seems quite constrained in its enthusiasm for such an outcome. This can have legal as well as political consequences. Darren Dick and Margaret Donaldson argue that without a continued development of native title in a manner that characterises it as an attempt to address racial discrimination, it could lose its constitutional validity under the external affairs power (giving effect to the CERD).⁵⁹

The Yorta Yorta people recently announced that they would take their case to the United Nations later in 2003. Yorta Yorta woman Monica Morgan, who co-ordinated the native title claim, said that “there’s a whole raft of issues the Yorta Yorta people may need to look at because we’re just not getting them looked at in domestic law.”⁶⁰ It has all the hallmarks of a powerful international precedent.

Conclusion

The construction of native title, ostensibly a permissible event, can be seen to be an exercise in constraining the legitimate claims of Aboriginal people in Australia. Michel Foucault and Edward Said have both written that power is most effective when it is productive, rather than preventative. Said writes that when culture is “consecrated” by the state, it becomes a normative system which thus has the power to effect a series of exclusions. The state then becomes not only a preventer or judge but a *giver* of values, in that the characteristics of a ‘true’ culture are defined and characteristics are set up which place people outside the realm of culture.⁶¹ Those cultural values that are not *given* are silently taken away.

The idea of culture becomes an exclusive one, and in Australia, a government and a legal system once foreign to the Indigenous people hoists itself into a position where it becomes the determinant of true Indigenous culture. As Veena Das writes, *untrue* characteristics are “located outside

⁵⁸ Particularly Article 1 of the International Covenant on Civil and Political Rights (UN).

⁵⁹ See n. 48.

⁶⁰ “Yorta Yorta take land claim to UN”, *Herald Sun*, 2003 (date not available from online news archive).

⁶¹ E. Said (1983) *The World, the Text and the Critic*, London, Faber Books, p. 10.

culture and civilisation by the state and its institutions.”⁶² This is cultural studies academia, but it is difficult to imagine a more telling and concrete example of this theory than the *Yorta Yorta* story. Judges of the legal system set up by the colonial power are telling the Indigenous people that their claim to land fails because their culture – supposedly an indicator and a product of their Aboriginality – isn’t *true* enough to enable them to claim back their land. In this brutal case, the court has taken for itself the power to determine whose culture is true, and whose culture is not.

This analysis suggests that the colonisation of Australia may be in a stronger position now than before native title was “remembered.” Before *Mabo*, the traditions and claims to land of Aboriginal people powerfully undermined the legitimacy of white occupation. Through the native title process as seen in *Yorta Yorta*, the colonial power is strengthened by diluting the threat of meaningful land rights, and expanded to take in ownership of the *true* Indigenous tradition and custom. Deborah Bird Rose refers to this activity as “deep colonisation” – where processes ostensibly for the benefit of colonised peoples actually serve to increase the dominion of the colony over their culture.⁶³

Curthoys points out the contested nature of Australian history and the tension between two major narratives, one emphasising discovery and peaceful settlement, the other emphasising invasion and violent dispossession. It is these narratives that come into conflict in the cross-jurisprudential exercise that is the construction of native title.⁶⁴

If a reader’s interpretation of any historical document will be informed by their position in relation to Australian history, and will “depend on the overall interpretive framework the historian uses,”⁶⁵ then the same can be said for a court’s interpretation of the stories that go into the evidence of a native title claim. This illustrates the difficulty with defining a stream of history which can be given the status of objective truth in a court of law.

Ann Curthoys foreshadowed this problem before Olney J handed down his original decision, warning that:

The fundamental questions of how continuity will be viewed in the light of Aboriginal laws and customs, and what constitutes proof of this continuity within the Aboriginal system of law must ultimately drive the search for evidence of continuous connection.⁶⁶

⁶² V Das, “Cultural Rights and the Definition of Community” in Mendelsohn and Baxi, *The Rights of Subordinated Peoples*, 1994, p. 122.

⁶³ This is a point she has made more than once, including Deborah Bird Rose, “Indigenous ecologies and an ethic of connection,” in N Low, *Global Ethics and Environment*. Routledge, 1999.

⁶⁴ For an excellent discussion of this, see see C Choo and M O’Connell, “Historical Narrative and Proof of Native Title”, in *Land, Rights, Laws: Issues of Native Title*, vol 2, issues paper no. 3, AITSIS, 1999.

⁶⁵ J Finlayson and Ann Curthoys, “The Proof of Continuity of Native Title”, in *Land, Rights, Laws: Issues of Native Title*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1997, p. 14.

⁶⁶ J Finlayson and Ann Curthoys, “The Proof of Continuity of Native Title”, in *Land, Rights, Laws: Issues of Native Title*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1997, p. 12.

The *Yorta Yorta* case shows that her fears, and the fears of many others, have come to fruition. Native title claimants are communities who have been forced to adapt to the ravages of colonisation and find ways for their community to survive. They have lived for centuries with the pressures of trying to maintain traditions while seeking a decent standard of life within the new reality. Olney J's use (undisturbed by the appeal courts) of the 1881 petition to the NSW Governor shows that Indigenous land claimants are offered the worst of both worlds. As their land was acquired by the Crown, communities were forced to adapt to survive, but now they are locked into evidencing their traditional laws in such a way as to prove that the tradition has continued uninterrupted. Customary laws are excluded from validity under the Australian state, but the *Yorta Yorta* are required to continue practicing them if they wish to succeed in native title. If the written "historical records" of squatters/anthropologists/historians are prioritised over the oral histories of claimant groups, it seems the only groups who will succeed in native title are those who impressed anthropologists with their "authenticity," and who have remained "true" not just to their culture, but to the colonial records of their culture. As Kiersten Anker argues:

For a native title claim to succeed, claimants must belong to a 'real live' aboriginal community living under traditional laws, but the laws that they must observe are not really alive, being preserved in some kind of colonial embalming fluid since 1788 - albeit that the mode of practice might have changed because the ability to breathe life into them is excluded by the idea of state sovereignty.⁶⁷

The optimism generated by *Mabo* could well be over. Native title has been constrained by the Courts to the extent that many people are wondering whether it is worthwhile. Sadly, it appears the High Court is engaged in a retreat from any notion that it may have a responsibility to develop the notion of native title through the common law. Despite second reading speeches in Parliament explicitly stating that native title is a creature of common law and so it will remain (both during the enactment of the original *Native Title Act 1993*⁶⁸ and debate over its amendment in 1997),⁶⁹ the Court has become very timid about native title, and seeks refuge in the *Act*, if possible. Lisa Strelein goes further, and accuses the court of failing its responsibility to the development of native title:

The abdication of judicial responsibility [in *Yorta Yorta*] is exacerbated by the Court's adherence to a line of argument which suggests that it is the legislation which limits the ability of native title to recognise Indigenous peoples' rights to their lands, rejecting any continuing role for the common law in determining the underlying concept or framing the interpretation of the *NTA*.⁷⁰

⁶⁷ Kiersten Anker, 2003, Tradition and cultural continuity in *Yorta Yorta* unpublished paper, on file with the author.

⁶⁸ Australia, Senate, *Parliamentary Debates* (Hansard), 16 December 1993 at 5097.

⁶⁹ See the comments from Senator Minchin: Australia, Senate, *Parliamentary Debates* (Hansard), 2 December 1997 at 10171.

⁷⁰ L Strelein, 2003, "Members of the *Yorta Yorta Community v Victoria* - comment", in *Land, Rights, Laws: Issues of Native Title*, issues paper vol 2 no. 21, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, p. 6.

The conclusions to the judgments of McHugh and Callinan JJ in *WA v Ward*⁷¹ and of Kirby J in *Wilson v Anderson*, the other two native title cases which reached the High Court last year, are very significant. Three justices, from sometimes polar viewpoints, wrote moving reasons why the device of native title is ultimately failing the Aboriginal people it was ostensibly designed to benefit. McHugh's conclusion in *Ward* is more pertinent now than when he wrote it:

The deck is stacked against the native-title holders whose fragile rights must give way to the superior rights of the landholders whenever the two classes of rights conflict. And it is a system that is costly and time-consuming. At present the chief beneficiaries of the system are the legal representatives of the parties. It may be that the time has come to think of abandoning the present system, a system that simply seeks to declare and enforce the legal rights of the parties, irrespective of their merits.⁷²

If we re-interpret this so that the conflict is between cultures, rather than rights of landowners, the statement reads just as well. Prospective native title holders around the country would be well advised to divert their energy away from litigation, and towards the making of on-the-ground agreements (Indigenous Land Use Agreements) that can guarantee meaningful co-existence. The process of native title has become too restrictive, its definition of tradition too ill informed, to be regarded as a meaningful exercise in achieving justice for Indigenous people.

⁷¹ [2002] HCA 28.

⁷² [2002] HCA 28 at [561].

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