Yorta Yorta: the effect of changes in traditional laws and customs in native title determinations

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I. Introduction

Members of the Yorta Yorta Aboriginal Community v State of Victoria [2001] FCA 45 (*Yorta Yorta*) is of considerable importance to native title litigation in a number of respects.[1] Whilst there have been numerous cases involving determinations of native title over remote areas of northern Australia, *Yorta Yorta* was the first case in which a claim for native title was lodged in a non-remote area of the Australian mainland which was the subject of European occupation at a very early stage in Australia's history.[2] Furthermore, in contrast to cases which have failed on a legal issue concerning extinguishment of native title, *Yorta Yorta* was the first case which has failed on the strength of its claim.[3]

The implications the decision in *Yorta Yorta* has on native title applicants are extensive. It illustrates a situation in which the courts have applied the dictum of Brennan J in *Mabo (No 2) v State of Queensland* (1992) 175 CLR 1 where the 'tide of history has washed away any real acknowledgment of traditional laws and any real observance of traditional customs [so that the] foundation for native title has disappeared'.[4] It further demonstrates '[t]he difficulties inherent in proving facts in relation to a time when for the most part, the only record of events is oral tradition. . .'.[5]

Given its importance, this case was very lengthy and complex. The Court sat for 114 days and heard evidence from 201 witnesses. The transcript of the proceedings exceeded 11 000 pages.

II. The facts and trial decision

This case concerned an application by eight people on behalf of the Yorta Yorta Aboriginal community under the *Native Title Act* 1993 (Cth) for a determination that communal native title existed over areas of land and waters in Northern Victoria and Southern New South Wales. The claim was accepted by the Native Title Registrar and referred to the Federal Court for determination in May 1995.[6] The applicants claimed rights including the right to possession, occupation, use and enjoyment of the land, waters and natural resources within the claimed area.[7] The claim area included state forests, state parks, water supply reserves, water reserves, flora and fauna reserves, forest reserves, scenic reserves, special purpose reserves, Aboriginal freehold land, vacant Crown land, reserved Crown land, and a mine.[8]

After a lengthy hearing, on 18 December 1998 Justice Olney determined that native title did not exist in relation to the claimed areas of land and water.

Olney J provided that in order to succeed, it was necessary for the applicants to prove biological descent from the indigenous inhabitants of the claim area in 1788.[9] His Honour

1 Hughston, V 'The Yorta Yorta Decision: a case of the 'tide of history'' ' February 1999, *Native Title News* 4(1) at 2.
2 Note 1 at 2–3.
3 Note 1.
4 *Mabo v State of Queensland* (1992) 175 CLR 1 at 59 per Brennan J; see also n. 1 at 2.
5 *The Members of the Yorta Yorta Aboriginal Community v The State of Victoria and Others* BC9806799, Federal Court of Australia, 18 December 1998 per Olney J at para 24.
6 *The Members of the Yorta Yorta Aboriginal Community v The State of Victoria and Others*, FCA, BC9806799, 18 December 1998, Olney J at 7.
7 Note 6 at 11.
8 Note 6 at 10.
9 Note 6 at 4.

held that although there was no direct evidence before the court of indigenous occupation of the claim area in 1788, such an inference could be made.[10] His Honour found that only the descendants of two people, Edward Walker or Kitty Atkinson/Cooper were descendants of such indigenous inhabitants.[11]

Olney J was of the opinion that in order to identify the nature and content of native title rights exercised by these indigenous inhabitants, 'the most credible' source of information was to be found in the writings of Edward M Curr, one of the first squatters to occupy land in part of the claimed area, and that, despite being at times, 'both credible and compelling',[12] less weight was to be given to the oral testimony of indigenous witnesses.[13]

His Honour found no evidence suggesting that by the end of the nineteenth century, Edward Walker or Kitty Atkinson/Cooper or their immediate descendants continued to acknowledge and observe the traditional laws and customs of their ancestors in relation to land.[14] His Honour further stated that evidence from the Aboriginal community itself also lead to this conclusion.[15] This evidence was a petition to the Governor of New South Wales, signed in 1881 by 42 Aboriginal people residing at or otherwise connected with the Maloga Mission, within the claimed area.[16] As 'all the land within our tribal boundaries has been taken possession by the government and white settlers', the petitioners were requesting a grant of land in order to 'cultivate and raise stock' so that they could change their 'old mode of life' and 'settle down to more orderly habits of industry'.[17] This leads to his Honour's conclusion that

> . . . by 1881, those through whom the claimant group now seeks to establish native title were no longer in possession of their tribal lands and had, by the force of the circumstances in which they found themselves, ceased to observe those laws and customs based on tradition which might otherwise have provided a basis for the present native title claim[18]. . .[therefore],. . .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 acknowledgment of their traditional laws and any real observance of their traditional customs. . .[19]

As a result of this conclusion, Olney J did not consider it necessary to consider issues of extinguishment of native title rights and interests. He did however give some consideration to the contemporary laws and customs of the claimant group.[20] His Honour considered the 'main thrust'[21] of these laws and customs to be concerned with the preservation of sacred sites and the 'proper management' of the land.[22] However, he was of the opinion that they did not provide a 'continuous link back to the laws and customs of the original inhabitants'[23] and were therefore not in essence 'traditional' laws and customs necessary for the recognition of native title rights and interests.[24]

10 Note 6 at 25.
11 Note 6 at 104.
12 Note 6 at 21.
13 Note 6 at 106.
14 Note 6 at 118.
15 Note 6 at 118.
16 Note 6 at 119.
17 Note 6 at 119; see also Case, N 'Tide of History or Tsunami?' *Indigenous Law Bulletin* December 1998/January 1999 at 18.
18 Note 6 at 121.
19 Note 6 at 129.
20 Note 6 at 122–128.
21 Note 6 at 122.
22 Note 6 at 122.
23 Note 6 at 128.
24 Note 6 at 128.

III. The arguments on appeal

The appellants argued that the trial judge attempted to establish the nature and content of the traditional laws and customs of the indigenous inhabitants of the area at the date of acquisition of sovereignty. They contended that making findings about past laws and customs and then moving the analysis forward in time, resulted in Olney J adopting a 'frozen in time' approach and therefore resulting in a failure to give adequate appreciation of the ability of traditional laws and customs to modify and evolve. They also contended that a related error involved the trial judge failing to take into account evidence of the continuation of traditional laws and customs by the claimant group.[25]

IV. The majority decision: Branson and Katz JJ

The majority of the Full Federal Court, constituted by Branson and Katz JJ, dismissed the appeal. As to whether or not the laws and customs of the indigenous inhabitants could be classified as 'traditional', their Honours acknowledged that there is a line of cases in which it has been established that the common law recognises the ability of native title to modify and evolve,[26] provided that they can still be characterised as 'traditional'. Laws and customs will not be traditional 'if they reflect a breaking with the past rather than the maintenance of the past in changed circumstances'.[27] In order to establish whether the modified laws and customs are traditional in nature, their Honours provided that an objective test is to be applied, the fundamental issue being whether the laws and customs have, in substance, been passed down through the generations.[28]

In determining whether or not the trial judge adopted a 'frozen in time approach' to the concept of traditional, their Honours noted that the definition in s 223 of the *Native Title Act* 1993 (Cth) is expressed in the present tense. Therefore, in order to maintain a claim for native title, reference must be made to the rights and interests currently possessed under the traditional laws and customs[29] and the Aboriginal community must have a current connection with the land under those laws and customs.[30] Their Honours contended that there was some ambiguity in the reasonings of the trial judge as to whether he proceeded on the basis that the claimants were required to show the laws and customs practiced in 1788 and their continuation, in substance, until the present.[31] They provide that the use by the trial judge of the phrase 'laws and customs based on tradition' in paragraph 121 of his judgment suggests against Olney J adopting a 'frozen in time approach'.[32] If the trial judge did proceed on this basis, their Honours stated that he was incorrect.[33] However, their Honours provided that such a finding did not affect the outcome of the appeal.[34]

Branson and Katz JJ were of the opinion that the petition relied on by the trial judge was of limited value given that it was not signed by the majority of the community. However, their Honours contended that it did suggest that the petitioners had lost their traditional means of survival and were 'turning away from' their traditional ways of life.[35]

25 [2001] FCA 45 per Black CJ at 77; per Branson and Katz JJ at para 167; See Ritter, D 'Note on Yorta Yorta Aboriginal Community v Victoria' *Native Title News* 5(1) at 2.
26 See *Mabo (No 2)* (1992) 175 CLR 1 per Brennan J at 70, Deane and Gaudron JJ at 110, Toohey J at 192; *Ward v Western Australia* (1998) 159 ALR 483 per Lee J at 502 and *Commonwealth of Australia v Yamirr* (1999) 168 ALR 426 per Beaumont and Von Doussa at para 64.
27 [2001] FCA 45 at para 122.
28 Note 27 at 127.
29 *Native Title Act* 1993 (Cth) s 223(1)(a).
30 Note 29 s 223(1)(c).
31 [2001] FCA 45 at 183.
32 Note 31 at 187.
33 Note 31 at 145.
34 Note 31 at 145.
35 Note 31 at 186.

In any event, their Honours were of the opinion that the trial judge had before him more than sufficient evidence to support a finding that between 1788 and the date of the appellants claim, there was a period during which the community had 'lost its character as a traditional community'.[36] This was said to be a consequence of physical separation from their traditional lands after European occupation and from a significant decline in numbers as a result of disease and conflict. Therefore, the connection to the land required under s 223(1) of the *Native Title Act* 1993 (Cth) had not been continuously maintained and native title was said to be extinguished and the definition of native title in the *Native Title Act* 1993 (Cth) not satisfied.

As to the appellants' second argument, Branson and Katz JJ contended that given the length and complexity of the trial, it would not be expected that the trial judge would make reference in his judgment to every matter which influenced his finding. They therefore found that the trial judge's failure to expressly refer to and evaluate particular pieces of evidence in his judgment, did not lead to the conclusion that he failed to take them into consideration.[37] Their Honours stated that an appeal court must use 'considerable caution' before inferring that crucial evidence and findings of fact were not made by the trial court.[38] Branson and Katz JJ therefore dismissed the appeal.

V. The dissenting judgment: Black CJ

His Honour delivered a well-informed judgment and concluded that the appeal should be allowed.

Black CJ concluded that the trial judge did not adopt a strict 'frozen in time approach'. He argued that such a conclusion could not be reached given that none of the respondents conducted their case on the footing that traditional laws and customs are frozen, and unable to evolve. He agreed with the majority in that although it was unclear from the trial judge's language as to whether he did adopt such an approach, 'a submission that the judge fell into an error of this nature needs more than equivocal language to support it'.[39] His Honour did conclude however that in determining that native title had expired before the end of the 19th century, the trial judge's approach to the concept of 'traditional' was too restrictive and did not give adequate recognition of the ability of laws and customs to evolve, whilst still being classified as 'traditional'.[40] His Honour argued that by drawing inferences about laws and customs from historical records written in the 1840's, in attempting to determine the content of traditional laws and customs in 1788, the trial judge gave paramountcy to historical observations without adequately acknowledging the limitations of such data as well as the strength of oral traditions.[41]

In relation to the second issue, Black CJ provided that entries in the diary of Daniel Matthews, founder of the Maloga Mission within the claim area, and a paper written by him and presented to the South Australian branch of the Royal Geographical Society of Australasia, as well as oral evidence of living members of the claimant group, supported a conclusion that the community's physical connection with the land continued at a time after which the trial judge found native title to have expired.[42] Therefore such evidence was directly relevant to a finding of fact on this issue. Black CJ recognised that in cases of this nature, there are many inherent difficulties in making findings of fact, and in the event that a case is decided against the claimants on the basis that acknowledgment of

36 Note 31 at 194.
37 Note 31 at 203.
38 Note 31 at 204.
39 Note 31 at 67.
40 Note 31 at 75; 68.
41 Note 31 at 70.
42 Note 31 at 79.

traditional laws and customs ceased years ago, this conclusion 'must be based on strong foundations'.[43] Therefore in failing to deal with this evidence, the trial judge was in error. Black CJ further commented that this was not a case in which the trial judge's finding can be upheld on the basis that it was a finding of fact and should not be upset on appeal.[44]

VI. Conclusion

This case has strong implications for future native title claims, particularly in less remote areas of Australia. Since the *Mabo* decision, the courts have recognised that native title rights and interests can modify and evolve whilst still being sufficient to constitute native title. This decision highlights the difficulties in establishing native title claims where issues concerning evolution of traditional laws and customs in long settled regions of Australia come into play. It is submitted that the trial judge and majority of the Appeal Court failed to recognise the strength of oral tradition in establishing Aboriginal connection with the land and focused too much on an objective assessment of such laws and customs. The members of the Yorta Yorta Aboriginal community have filed an application for special leave to appeal to the High Court of Australia against the Full Federal Court decision. The outcome of such an appeal is eagerly awaited.

43 Note 31 at 85.
44 Note 31 at 91.