Indigenous Claimants and the
Native Title Process: The Yorta Yorta Case

Introduction

This lecture, which will focus on Yorta Yorta Occupation and Possession of the Claim area in accordance with doctrine of continuity and the requirements of NT. As a case study in Native Title in southeastern Australia, it will examine the extent to which claimants have to prove inherent rights, and the way that Yorta Yorta connections has been treated by the courts. This will provide the basis for analysing the prevailing barriers to Indigenous land justice in the post-Mabo context and for reassessing Indigenous based rights in 21 Century Australia.

1. Background

Not going to give a blow-by-blow description of the historic Yorta Yorta struggle for land justice, except to say that it has been an ongoing process. The evidence presented to the Courts in the YYNTC demonstrates that land justice has always been at the heart of our struggle. The current claim is in fact the 18th attempt to settle the long-standing issue, which has its roots in the original land disputation that took place at colonisation. We have never ceded, our inherent rights to land, nor have we disbanded our traditional connections with the ancestral land and waters.

2. Our Current Land Status

Both States that border the Yorta Yorta lands have refused to recognise our traditional ancestral lands and the Commonwealths attempts to redress land injustices have been equally dismal. As indicated in the Koori Land Justice lecture, the only lands returned to our people on the basis of prior rights by those states that border the Yorta Yorta, have been a little over half of the original Cummeragunja lands of 2,965 acres. These were part of the lands that were reserved for Indigenous purposes in the 1880's. Most of the Cummera lands were leased to European farmers up to the 1950's and some
of the land was returned, under the *NSW Land Rights Act, 1983 (NSW)*. When measured in the context of the original 20,000 square kilometres of tribal lands stretching on both sides of the Murray, it is but a small portion of those traditional lands that were occupied possessed and enjoyed by our ancestors since creation. This highlights what our current land status is and the context in which the current native title claim was made following the historic *Mabo* decision.


Nearly a decade has passed since the High Court recognised the existence of Native Title in Australia. Those substantive claims in Australia including the Yorta Yorta have all been appealed (see *Mary Yarmirr & Ors v The Northern Territory of Australia & Ors* [1998] 771 FCA; *Mirriuwung-Gajerrong v State of Western Australia and Ors* (1998), likely to go to the High Court; *Yorta Yorta v State of Victorian and Ors* 1998; *Hayes v Northern Territory* [1999] FCA 1248). The current situation is that the amount of native title land returned in Australia since *Mabo* is minuscule. For those Indigenous people who have been waiting for over two centuries for land, it is a sad reflection on Australia's legal and political institutions, not to mention the prevailing antipathy towards Indigenous rights (National Native Title Tribunal Web Site: www.nntt.gov.au; Age 10 October 1996).

With the raised hopes of land justice offered by *Mabo*, we were one of the first Indigenous groups to take advantage of the native title process. Australia's attempts to bring our law into line with other common law jurisdictions, that recognised Indigenous title, and the High Court's rejection of those actions that justified the theft of Indigenous land, were commendable achievements. The sequential barriers to native title, it appeared had been dismantled, and a more level playing field was set for Indigenous claimants. While the removal of old barriers to land justice were encouraging, the construction of new ones has been a disheartening experience for my people. As demonstrated in the YYNNTC, this has set the Indigenous struggle for land in the more populous regions back to the pre-*Mabo* era. This experience, suggests that under existing conditions the ideals of equality and justice before the law remains ever illusive. To be in grasping distance of our historic dues and to then have
them whisked away by legal deception highlights the protracted nature of the process, not to mention the patience and endurance required to achieve justice in the long run.

5. Barriers to Native Title

In setting the groundwork for claiming native title, the High court placed strong limitations on gaining land justice. It secured Anglo land rights by applying the doctrine of extinguishment and refused to apply fair and just principles of compensation for the appropriation of Indigenous lands over the last two hundred years. No-ones back yards or the main streets of country towns were at risk.

5. Tide of History - Come back to the Tide of History Euphemism

Justice Brennan also introduced the 'tide of history' metaphor that was used as an extreme case scenario of native title loss. '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'. The tide of history idea is then qualified by Brennan and other Judges in the context of the changing and evolving nature of traditional culture.

Justices Brennan, Mason and McHugh agreed, that cultural change was not only natural but an inevitable process. In allowing for changes in laws, customs rights and interests to occur over time the crucial issue was:

'so long as the people remain as an identifiable living under its traditional base laws and customs, as currently acknowledged and observed' the communal native title survives to be enjoyed by the members of the community (Mabo (No2): 61).

Justices Deane and Gaudron agreed, that traditional laws and customs 'were not frozen at colonisation' but changed over time and it was the continued connection that really mattered.
In *Mabo* (No2), it was physical presence on the land that was sufficient enough for Justice Toohey to find that Native Title existed. Quote from Toohey. 'The defendants in the Murray Island case did not argue that the plaintiffs failed because their presence on the Islands was too recent; the relationship of the people to the Island was sufficient; their presence was not coincidental and random; and modification of traditional society in itself does not mean traditional title no longer exists'. This is not dissimilar to the Yorta Yorta, the majority of whom, still live in the claim area and have maintained their connections with the ancestral land and waters. GIVE EXAMPLE ON MAP. Talk about myself here living in city but maintaining connections with country (Toohey J. at 192; *Mabo* (No2), 1992:5; Bartlett, 1993:5).

6. THE CRUX OF THE MATTER- Olney's Application of the Tide Idea-

Justice Olney, ignores the evidence of continuity, and disregards the majority of the evidence that was drawn from the Yorta Yorta-54%. He then takes Brennan's idea and applies it in the absolute sense as a justification for denying our connections with the ancestral lands. The legal barrier of *terra nullius* which was abolished by *Mabo* has now it seems been replaced with the 'Tide of History' euphemism (No2), 1992 Brennan J, at 59-60; Pitty, 1999:2).

Olney J's test and his underlying reasoning support the sequential hurdles process for Indigenous people. That is, no sooner you knock one barrier over then another is quickly constructed.

Many other problems arise from the Olney decision.

7. Olney's Findings

Olney J. chose to elicit our traditional laws and customs from the observations and writings of two Europeans, Edmund Curr and Daniel Mathews. Curr was one of the first pastoral intruders into traditional Yorta Yorta lands, and Mathews was a missionary who set up the Maloga Mission for Yorta Yorta and neighbouring groups from 1874 to 1888 (see-Chapters 3-4). Olney J. relied almost exclusively on Curr's observations in deciding that the Yorta Yorta today are not practising the same laws and customs as their
ancestors in 1788, and on the writings of Mathews to establish that there was
no evidence to suggest that the Yorta Yorta continued to acknowledge
traditional laws and customs after the 1880s. In Olney J's view, for us to
succeed in native title it seems that we should have been dressed in full tribal
regalia performing the same cultural practices as those interpreted by a white
pastoralist one hundred and fifty years ago!

Olney J.'s selection of this period as a cut off point is an extremely arbitrary
and Anglocentric approach to Native Title. It infers that our occupation of
the ancestral lands ended at the time of missionary intervention. The return
of some land (1800 acres in 1883), to repair the injustices of land loss and to
provide a means of survival for our people, has been construed to imply the
relinquishment of prior customary law rights (para129).

Olney J. attempts to justify his conclusions by applying Brennan J.'s 'Tide of
History' metaphor, which he uses to try and erase Yorta Yorta native title
rights. Underpinning the events on which this ‘tide’ rests, is a history of land
injustice and flagrant human rights abuses. They are sourced in violence and
bloodshed over the ownership and control of land, acts of genocide in relation
to the forced removal and attempted break-up of Indigenous families, and
racist government policies aimed at subjugating and controlling Indigenous
people. It is ironic in the extreme, many might say obscene, that the crimes
against humanity, which constitute this ‘tide’, can be invoked by those
seeking to deny Indigenous groups their rights to land.

This approach to Native Title seems to be driven more by 19th Century
assimilationist ideas of Aboriginality, rather than the principles of Native
Title. That is, the Judge attempts to normalise those traditional connections
that the Yorta Yorta strove to maintain, by treating them as general
mainstream activities. Olney J.'s approach not only denied land justice to the
Yorta Yorta, it has broader ramifications for Indigenous claimants on
mainland Australia (paras 106,118,122-129,106).
As the decision is now before the Court on appeal, I want to conclude on some of my own reflections of the Native Title Process that we have been through since the claim was lodged in 1994.

8. Reflections on the Native Title Process

After lodging our claim, we chose in good faith to go before the NNTT and faced the unprecedented opposition of over 400 parties to the claim. Mediation was an experimental exercise in the Yorta Yorta case. After gaining no substantive agreements or expressions of 'co-existence' particularly in the spirit of the 'reconciliation process', we chose to go before the Federal Court. Our reliance on the courts is based on the reality that there is no alternative to the introduced law as it stands, other than reverting to direct political action. Our customary law, contrary to the wishes of Indigenous people, is not given equal status and can only be called on to source the nature and content of our traditional connections even post-\textit{Mabo}. We cannot call on international mechanisms until we exhaust all domestic remedies. We are locked into the process and are committed to following it through to its logical conclusion, which may mean years in the courts. Underpinning these realities are the expectations of Yorta Yorta people, who are watching closely in the hope of enjoying a better and more secure future.

The main obstacle to Mediation proved to be the prevailing antipathy towards Indigenous rights. Respondents were unwilling to recognise the Yorta Yorta as a group let alone that their inherent rights should be given equal protection. The mindset that was experienced in previous claims 1984 came back to revisit the Yorta Yorta. It remains one of the main barriers to achieving land justice in the \textit{Mabo} era.

The misinformation campaign fuelled in rural Australia as a result of \textit{Mabo} and \textit{Wik}, returned us to the anti land rights climate of the 1980's. This time it was 'backyards', 'main streets', and 'bucketloads of extinguishment' that opponents of Native Title used to fuel the debate (Victorian Government Hansard, 12 November 1998:10-25; Alford, 1999:43-44). It produced a climate of fear and racial hostility towards Indigenous groups. In the absence of an equivalent campaign to counteract the misinformation campaign, it was
again allowed to manifest itself on local Indigenous groups. That is, it forced us into a position of having to defend our rights against the attacks of the fearful and misinformed rather than focusing on the issue of land justice (see- Chapter 5 at 5.1.3).

9. Who is Native Title Empowering?

In my thesis, I examined the resourcing of the YYNTC, and the issue of empowerment under the Native Title process. I argued that resources being committed to Native Title has created the 'Native Title Industry' and that the Native Titleholders to whom the industry owes its existence are the less beneficiaries. This was highlighted in the native title process. The Yorta Yorta sat at the back of the court, waiting patiently for justice to be delivered, while their independent voices were spirited away and articulated by others. The expenditure by those opposing the Yorta Yorta claim however was far greater. Though the figures have never been made publicly available, the Kennet Government is said to have spent '4 million dollars' opposing our claim, not to mention the expenditure of the New South Wales Government and other land and water authorities (Age, 8 March 2000). The ability of state governments to absorb such high levels of expenditure in opposing claims seemingly endlessly without public protest inevitably leads to a massive increase in the cost and complexity of the process for all parties.

Given the enrichment of non-Indigenous parties within the Native Title machinery, it seems likely that they stand to gain more from prolonging the proceedings than from resolving them. As well, Indigenous people have been further disempowered by these litigious and protracted proceedings. That is non-Indigenous professionals have become richer, while Indigenous claimants have had to sit it out on the periphery. Take native title holders out of the equation and the industry would collapse (Atkinson, 1999). Need to qualify my analysis here in that there are some lawyers that are committed to the issue of Indigenous rights rather, than self-empowerment through the Native Title process, but they are very few.
10. Mercenaries

Being the first contested Native Title case before the Federal Court, the Yorta Yorta found themselves confronting the combined might of a multitude of vested interest groups. That major battle was exacerbated by the mercenary character of some lawyers, anthropologists and historians. The knowledge and experiences appropriated from Indigenous studies and work on other claims was used in a mercenary way by selling out to government interests and attempting to undermine Yorta Yorta people and the claim (see Oxford Definition of Mercenary).

Ethical bodies associated with such professions must give serious consideration to the implications of these practices. To obtain information from Indigenous people and then to reformulate it in the fashion most suitable to the needs of a 'client' opposing Indigenous interests, places the researcher in the position of mercenary. It brings the professions concerned into disrepute and has the potential to destroy the trust necessary if these disciplines are to continue their dialogue with Indigenous groups.

Conclusion

In the final analysis, it seems that it is not so much a question of the law providing justice for Indigenous people but one of how justice can be achieved against existing barriers. As witnessed in the Yorta Yorta case, the privileging of Anglo-knowledge and property rights and the derogation of Indigenous entitlements are inherent obstacles. Others relate to the shameful record of State governments in dealing with land justice, the antipathy of opposing parties and the mindset of regional Australia. These barriers are not dissimilar to those experienced in past claims. That is, when the foundations of the law in relation to the ownership and control of land are contested, and ground appears to be gained in the struggle for justice, the system tends to close ranks. It becomes the instrument of power that is used to serve the vested interests of settler society and to maintain the status quo. Under these conditions, it is the power relations between the dominator and the controlled, and notions of racial superiority that are perpetuated.
The degree of opposition encountered, and the allocation of millions of dollars by Governments to oppose our claim is an example of status quo politics at play. This may be a sign of how deeply the psychosis of domination and racism still runs, particularly within government and parts of regional Australia. Whether we have moved beyond our 'state of internal colonialism' or advanced to a ‘better understanding’, are important questions that confront the Reconciliation process. This is not to deny that these are ideals that Indigenous and non-Indigenous Australians are endeavouring to achieve, but as demonstrated in the Yorta Yorta case there is still a lot of healing to be done before real, genuine and effective Reconciliation can be achieved.

Removing the structural barriers to Native Title and rectifying past injustices, including the empowerment of Indigenous people, are necessary steps towards the process of healing, but they are still matters of unresolved business. Whether or not the mindset of opposition, highlighted in the YYNTC, can be reconciled with Indigenous land justice is a challenge that confronts Native Title, the Reconciliation process, and the nation as a whole. The first historic task of Reconciliation surely must be a fair and just settlement of land for Indigenous people, as a basis for achieving substantive equality and autonomy.

Finally, the appropriation of land and resources without consent or without the provision of compensation continues to deny Indigenous people their legal entitlements. The common law provides equality before the law for settler interests, but then treats Indigenous title as an inferior form of land ownership. The rhetoric of 'full respect' and equality supposedly given to Native Title in *Mabo* is not mirrored in the way it is being applied in the administration of Native Title law. As demonstrated in the YYNTC, the attainment of these principles is dependent on the extent to which a settler society is prepared to concede its dominant position to one of fairness and equality before the law. Native Title, in theory, seems to be trying to accomplish fairness and justice. In practice however, there are major flaws in the criteria being used to translate Indigenous law and knowledge into the Anglo-Australian legal system because of pre-existing norms and values. The NTA cannot be interpreted without reference to the existing context and
interpretive tradition. The Yorta Yorta case exemplifies these inadequacies and highlights the prevailing barriers.

Unless the barriers to land justice in the YYNTC are removed, the rhetoric of Mabo and the principles of law on which we pinned our hopes will remain elusive. With ‘Not One Iota’ of land justice forthcoming, in 21st Century Australia, it is relevant to touch on the words of Yorta Yorta elder and leader, William Cooper that were articulated over half a century ago:

How much compensation have we had? How much of our land has been paid for? Not one iota! Again, we state that we are the original owners of the country. We have been ejected and despoiled of our god-given right and our inheritance has been forcibly taken from us (William Cooper, Yorta Yorta 1939).

One can be reassured that Uncle William’s words will continue to be the driving force of the Yorta Yorta struggle.

That will provide the basis for the assignment on the Yorta Yorta Case Study and for reassessing Indigenous Land and Heritage rights in 21 Century Australian politico-legal discourse.

Next week we will be look at Koori Heritage and the Politics of Control in Victoria

Thank You

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