1. Introduction

This paper analyses the Yorta Yorta struggle for land justice that culminated in the Federal Court trial of 1996-1998 and the Olney J. decision, of December 1998. The title symbolises the manner in which the decision was handed down and its effect on our historic struggle. The decision will be scrutinised in relation to the way the evidence of Yorta Yorta occupation and connections has been treated. This sets the context for assessing the extent to which the Yorta Yorta have been able to gain land justice under Australian politico-legal systems. The analysis of the Olney decision will focus on the administration of justice and equality before the law in the Yorta Yorta case. The requirements of proving continuous connection has been dealt with by the courts in other Native Title claims, and the position taken by Olney J. can be contrasted with those taken by Lee J. in the Mirriuwung-Gajerrong (1998) and North J. in the Karajarri (2000) cases.

1.2 Determination of Yorta Yorta Native Title Hearing

The 18th of December 1998 will remain a significant date for the Yorta Yorta. It was the day the trial Judge took just nineteen seconds to announce: 'that native title does not exist' in relation to the areas of land and waters being claimed.

In his analysis of the factual evidence, Justice Olney concluded that:

The Yorta Yorta did not occupy the land in the relevant sense since 1788, and that their ancestors ceased to occupy their traditional lands in accordance with their traditional laws and customs before the end of the 19th century, that the tide of history (metaphor from Mabo (No. 2) Brennan J. at 43), had washed away any real acknowledgment and observance of Yorta Yorta traditional laws and customs and that native title in relation to the claimed area had disappeared and was not capable of revival (para. 129).

To end up with such a harsh judgement at the completion of what has been a long and gruelling battle was a bitter pill. We expected that our historic struggle would bring some measure of justice. The judgement had the opposite effect. Justice Brennan's 'tide of history' (metaphor from Mabo) was construed to deny our traditional rights within the claimed lands, rights that have always been self-evident to the Yorta Yorta, and other Indigenous groups.
1.3 Errors of Law in the Judgement

Olney J. chose to elicit our traditional laws and customs from the writings of two Europeans, Edmund Curr and Daniel Matthews. Curr was one of the first pastoral intruders into traditional Yorta Yorta lands, and Matthews was a missionary who established 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 and Matthews' writings to infer that Yorta Yorta connections with the ancestral lands had been washed away before the end of the 19th Century.

Olney J.'s selection of this period to try to cut off Yorta Yorta entitlements represents an arbitrary and Anglocentric approach to Native Title. 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 Yorta Yorta rights to land and resources (para. 129). Olney J. then uses the 'tide of history' idea to rationalise his judgement and to try and erase surviving Yorta Yorta Native Title rights. This approach seems to be driven by 19th Century assimilationist discourse, rather than the principles of common law 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 has not only denied land justice to the Yorta Yorta, but has broader ramifications for Aboriginal claimants in the more populous regions of Australia (paras. 106, 118, 122–9, 106).

The decision will now be analysed from the position of one who is both an Indigenous claimant and a scholar in land justice matters.

1.4 Test for Proving Native Title

Olney J. argues that a claim to Native Title involves a number of distinct avenues of inquiry.

First it is necessary to prove that the members of the claimant group (whether it be a clan, a community or otherwise) are descendants of the indigenous people who occupied (in the relevant sense) the claimant area prior to the assertion of Crown sovereignty (para. 4).

In setting the test for proving connections, Olney J. then places emphasis on individual connections rather than group continuity (paras. 51–2). First, the Yorta Yorta are required to establish that:

one or more of the named ancestors was a descendant of an indigenous inhabitant who occupied the claim area at or prior to 1788 and second, that one or more of the claimant group is a descendant of such an ancestor (para. 51).
Earlier in his judgement, Olney J. cites Mason CJ. McHugh J. and Brennan J. on the origins and content of Native Title, and then quotes Toohey J. in support of the proposition that 'so long as occupancy by a traditional society is established now and at the time of annexation, traditional rights exist'. The emphasis on group rather than individual connections is supported by Deane and Gaudron JJ. (at 86) who refer to the requirement that there be an 'identified community' (rarely an individual) in occupation at colonisation with an established entitlement to the land under the local law or custom (Mabo (No. 2) 1992:31). This requirement is not dissimilar to the position in the Delgamuukw (1991) and Mirriuwung-Gajerrong (1998) cases.

Justice Lee discusses the nature of the founding community and its relationship to the contemporary claimants in some detail. He says:

> It is implicit in the reasons of Deane, Gaudron JJ. that the claimant for native title is capable of being identified as 'a tribe or other group' (at 110) and, similarly, in the reasons of Toohey J. which refer to communal native title being vested in an Aboriginal group (at 178–9).

Brennan J. (at 61) states that communal Native Title survives so long as Indigenous people remain as an 'identifiable community' living under traditionally based laws and customs. Neither Deane, Gaudron JJ. nor Toohey J. refers to a requirement of 'biological descent'. This will become clearer when we examine the test that Olney J. extrapolates in the Yorta Yorta and other cases.

**1.4.1 An Identifiable Community**

Defining a community of Indigenous people connected to land by traditional laws and customs by reference to 'biological descent' involves a broad understanding of descent, not the application of a narrow and exclusive test. If there were no evidence that the community claiming Native Title had some ancestral connection with the Indigenous community in occupation of the land at the time of sovereignty the task of showing substantial maintenance of connection with the land would be difficult to satisfy. Some evidence of ancestry would be necessary not only to identify and define the group entitled to Native Title but also to show acknowledgment and observance of the traditional laws and customs of the community that possessed Native Title, thereby showing that connection with the land had been substantially maintained (Mirriuwung-Gajerrong (1998) at 30, 41).

This has been supported by McEachern CJ. of the British Columbia Supreme Court, in Delgamuukw v British Columbia (1991) 79 DLR (4th) 185 at 282 and approved by Macfarlane J. in Delgamuukw v British Columbia (1993) 104 DLR (4th) 470 at 506:

> In a communal claim of this kind I do not consider it necessary for the plaintiffs to prove the connection of each member of the group to distant
ancestors who used the lands in question before the assertion of sovereignty.
It is enough for this phase of the case...for the plaintiffs to prove, as they
have, that a reasonable number of their ancestors were probably present in
and near the villages of the territory for a long, long time.

Of course, as made clear by the Supreme Court of Canada in Delgamuukw per Lamer
CJ (at 253–254) ‘a long long time’ is not a requirement that occupation be shown since
time immemorial; it need be no earlier than the assertion of sovereignty by the Crown.
For Olney J., the inference of Yorta Yorta occupation in 1788 is compelling:

…whether or not the Indigenous people who were found in occupation of the
claim in the 1830s and 1840s, and about whom there are available records,
were the descendants of those who occupied the area at the time sovereignty
was asserted, is a matter to be addressed later. It is the descendants of the
people who occupied the area in 1788, and whose traditional laws and
customs in relation to the land became, at the time of sovereignty, a burden
on the radical title acquired by the Crown who are entitled, in appropriate
circumstances, to recognition as the native titleholders (para. 25).

Olney J. then proceeds to restrict the inquiry into connections with country to the
'available records' and ignores the volumes of genealogical evidence provided by senior
Yorta Yorta witnesses. Many of the applicants gave oral testimony concerning, for
example, the group affiliations of their ancestors, something about which the written
records are generally silent. Yorta Yorta elder Ken Briggs and others gave evidence of
genealogical connections and were called on to clarify family relationships, which was
done with precise detail. Surely this was of direct relevance though Olney J.
subsequently ignores it completely (see Ken Briggs, exhibit A8. t.321–322, 1345, 4979–
4982, 5657, 5679, 5681–5683 and Yorta Yorta Evidence in Chapter 7).

Olney J.’s 'individualised' approach to proving descent is at odds with the principles of
Mabo. Contemporary Yorta Yorta people, in his view, had to establish a direct
connection to named individuals present before white occupation or ideally at the time
of sovereignty. According to the High Court, however, it is the continuity of the
community that is the fundamental issue. Evidence of individual descent from
individuals alive at that time can obviously help to establish this, but is not essential. As
Lee J. remarks in Mirriuwong-Gajerrong (1998):

Defining a community of Indigenous people connected to land by traditional
laws and customs by reference to biological descent involves a broad
understanding of descent, not the application of a narrow and exclusive test.
If there were no evidence that the community claiming native title had some
ancestral connection with the Indigenous community in occupation of the
land at the time of sovereignty the task of showing substantial maintenance of
connection with the land would be difficult to satisfy.
For Lee J. as for the Canadian authorities that he cites, the important thing is establishing a connection in general terms between then and now. For Olney J., a much narrower, more confining test is necessary. Interestingly, in *Croker Island* (para. 88) Olney J. seemed quite happy with connections simply drawn back to residents in the area in the 1880s. Apparently, Olney J. sets a higher standard of proof for the Yorta Yorta than judges have adopted in other cases and, indeed, a higher standard than he required himself in either the *Croker Island* or Alice Springs Native Title claims (*Croker Island Appeal* (1999) Beaumont, von Doussa and Merkel JJ; Levy, 2000:21–2).

The test applied by Olney J. seriously overstates the level of necessary proof. In other cases it has been sufficient to establish that a person to whom one traces ancestry in the early days of settlement is simply a member of the group which is traditionally identified with the area and which, it can be reasonably assumed, was the community in occupation at the time of sovereignty. There is no requirement to make the connection to an individual present in 1788. By applying such a test, Olney J. required more proof of Yorta Yorta connections than of those groups in more remote areas, even despite the obvious difficulties imposed when settlement occurred several generations earlier.

This matter becomes particularly obvious when one examines his subsequent treatment of the issue in the case. Olney J. uses a combination of geographical and genealogical issues to establish 'proof from the half century from 1788 to the advent of European settlement' which he agrees 'may well be satisfied by inference.' But he then adds that:

...the mere presence of one or more persons at a particular place at a particular time in history goes nowhere to providing either the traditional rights and interests of the descendants of such person or persons in relation to land and waters, or the geographical limits of the land and waters in relation to which it is said native title rights and interests are enjoyed (para. 52).

It may not be sufficient in itself, but it does not 'go nowhere'. When coupled with other information such as, for example, evidence from either historical or Indigenous knowledge that the person concerned was a member of the group specifically identified with that particular area of land or waters, it may well be sufficient to enable the inference to be drawn. Again, the comments of Lee J. and the Canadian authorities are relevant.

In addition, there is Kirby J. in *Mason v Tritton* (1994) who observed that in light of the impact of colonisation and the inadequacies of the genealogical record of the time it would be next to impossible to prove genealogical connections back to the time before 1788 and it would be unreasonable and unrealistic for the common law of Australia to demand such proof for the establishment of a claim to Native Title. Kirby J. held that:

The common law, being the creation of reason, typically rejects unrealistic and unreasonable principles. If, therefore, in this case the only problem for
the appellant had been that of extending the proved use of land by his aboriginal forebears from the 1880's back to the time before 1788, I would have been willing to draw the inference asked. In more traditional aboriginal communities the inference will be quite easily drawn. But, even in this case, it would seem to be common sense to draw it (Mason v Tritton (1994)

Olney J.’s requirements in the Yorta Yorta case amount to the application of unrealistic and unreasonable principles. Olney J. then cloaks his proposition with the need to verify the known ancestors through the ethnographic record by saying that:

One of the major problems with the presentation of the applicants' case is the need to connect the 'known ancestors' with the people whose traditional laws and customs at and before the time of European contact entitled them to the rights of ownership, possession, occupation and use now claimed by their descendants. The problem is highlighted by the fact that neither Curr's writing nor Robinson's journals identify any individual Aboriginal with whom either made contact in the 1840's who can be connected with any of the named ancestors (para. 56).

Again, we see Olney J.’s stress on individual identification and the Judge’s privileging of European records over and above the substantial genealogical knowledge articulated by Yorta Yorta people. The task would, in fact, be made impossible by the use of Indigenous names by Curr and Robinson and 'christian' names by Matthews and other later European officials. Thus Olney J. applies another 'unrealistic and unreasonable’ requirement to the Yorta Yorta.

There was extensive evidence before the Court which provides information about the groups to which many of these early people belonged. Ms Harris, a genealogist retained by the State of Victoria, provided the Court with a substantial body of material obtained from official records of births, deaths and marriages which Olney J. agreed was both invaluable to the Court and supportive of many aspects of the applicants' case (para. 37). In almost all respects, it corroborated the oral testimony of the applicants' witnesses concerning their genealogical relationships with early residents of Maloga and Cummeragunja (para. 58) and the extensive genealogical evidence presented by Mr Hagen. Taken together, these resources provide a great deal of information about Yorta Yorta ancestors from the early white occupation period.

Olney J. chose to ignore most of it, limiting himself to the birth certificate materials and limited aspects of materials recorded by Daniel and Janet Matthews appearing in the Appendices of Mr Maloga. Most seriously, he ignored the Indigenous oral evidence on such matters and even much of the documentary material including the writings of Thomas James, Ronald Morgan, Theresa Clements and myself.

One is again reminded of the more pragmatic approach of Justice Lee in Mirriuwung-Gajerrong where he held that
'unless there is evidence to the contrary, it may be inferred that when European settlement of the claim area began some sixty years after sovereignty was asserted, the Aboriginal inhabitants then in occupation of that area were connected to the land of the claim area and with the Aboriginal people who occupied the claim area at sovereignty. As far as the requirement of descent is concerned, it is sufficient to show that an inference may be drawn that known ancestors were connected with the community in occupation at the time of sovereignty and with members of the present community. These ancestors were parents and grandparents of present claimants (Miriuwung-Gajerrong (1998) at 41, 58).

In tracing the connections and locations of the Yorta Yorta ancestors, Olney J. held that the 'ancestors identified did not have any special standing in relation to any particular locality within the claim area’ (para. 63). It is unclear what Olney J. means by 'special standing' here. If he meant it in the specific legal sense then he departs by a great distance from the view of the High Court in Onus v Alcoa, where, on the basis of far less evidence, members of the contemporary Gundij-Mara community were found to have standing in respect of the Portland Aluminium Smelter site (Onus v Alcoa Of Australia Ltd. (1981) at 27). Furthermore, the handing back of cultural materials to the Tasmanian Land Council in Roy Sainty and TALC v Allen & Murray & LaTrobe University (1995) implies standing in relation to Indigenous Cultural and Intellectual Property Rights (Jankes, 1999:84–85; Harris, 1996:28–32). In light of the evidence it would seem that Olney J.’s emphasis on standing in the Yorta Yorta case is unrealistic.

Olney J. says:

…one of the difficulties encountered in interpreting the records, particularly those of Maloga, is that many of the descriptions of the places of origin of the people named and of their "tribal" affiliation are either ambiguous or lack any meaning' (para. 65).

It is inevitable that information of this type will be imprecise. Non-Indigenous writers had a very poor understanding of matters in the 1880s. Nevertheless, Olney J. seriously understates the value and depth of the evidence before him. The Maloga records, for example, include lists that identify specific ancestors with a located 'tribe' within the original lands. The lists certainly lack sophistication in an ethnographic sense, but they are not devoid of meaning. When one considers the sentiments expressed by Kirby in Mason v Tritton they are worthy of far greater weight than Olney J. gives them. Both Mason v Tritton and the Canadian cases highlight the problem that Indigenous groups face given the absence of adequate documentary materials. In a slight twist, Olney J. fails to make proper use of those documentary materials that do exist in support of the applicants' claim. On the other hand elsewhere, as we have seen, he places great stress on questionable materials of Curr and Matthews, which he sees as antagonistic to the Yorta Yorta case.
Olney J. maintains that he should ‘deal with each named ancestor on the basis of the totality of the evidence’. This might at first seem like a reasonable approach but it is not what he subsequently does. Instead, as will be shown, he ignores all Indigenous evidence on these matters and the substantial amounts of white documentary material as well (para. 71).

1.4.2 Yorta Yorta Ancestors

In his analysis of the known Yorta Yorta ancestors Olney J. makes the following comments:

The purpose of the following comments is to ascertain from the evidence the extent to which the known ancestors provide the necessary link between the present claimant group and the original inhabitants of the claim area. The applicant’s case requires that I draw an inference that all or some of the known ancestors were descended from an Aboriginal person who occupied (in the sense described by Toohey J. in *Mabo* (No. 2) at p 188) the claim area or a part of it, at the time that the British Crown claimed sovereignty over the colony of NSW. It is clear from an analysis of the evidence that a number of them must be eliminated from the outset (para. 88).

Olney J’s phrasing again places excessive emphasis on individual rather than community interests. It is sufficient to establish that an ancestor is a descendant of a group that occupied the claim area. There is no need to produce further evidence refining this to enable the drawing of an inference to a particular Aboriginal person at the time of sovereignty. If it is clear that members of the contemporary community are descendants of the community in occupation at time of colonisation, or of narrower groupings within the broader overarching Yorta Yorta Bangerang territories, then that should be sufficient to establish Native Title connections.

There was a great deal of evidence in front of the Judge concerning the relationship of ancestors to particular areas. Little of it is referred to in his judgement. Olney J. does go on to mention specific identification of Kitty and Edward Walker with particular localities within the claim area. Material from Daniel Matthews’ diaries and mission reports, relied on heavily by Olney J. in other parts of his judgement, is disregarded when it comes to the question of ancestral identification with land. Other documentary materials, some of it tendered by opponents of the claim, also contained relevant information. For example, Olney J., when dealing with one of the Yorta Yorta ancestors, Tommy McCrae, maintains that ‘In the absence of any evidence as to his parents, it is not possible to draw any inference that would connect him with an original inhabitant of the claim area’ (para. 97), but 1885 correspondence tendered by the State of Victoria identifies Tommy McCrae and his wife and two children and Kate Bragny as ‘belonging to Wahgunyah and Wangaratta’ (see Figures 1 & 2).
Similarly, Olney J. goes on to say that the:

claim by those who trace their link of descent back to either Alfred or Bagot Morgan is dependent upon establishing the status of their mother…no evidence upon which an inference can be drawn that she was descended etc. Alfred's place of birth remains a mystery (para. 89).

Bagot Morgan however is identified by numerous contemporary witnesses (some of whom knew him personally) as a Yorta Yorta man. His own son, writing around 1950, says of him that 'Most of his childhood days he spent with his mother's native tribe roaming the wild. This tribe is known as the Yorta Yorta' (para. 89). This statement surely constitutes knowledge of his mother contrary to an explicit statement by Olney J. (para. 89). Bagot's mother is also identified by name as 'Kitty' in the 3rd Maloga Report (cited by Harris in Ex Vic 3.6.1, Appendix. 21.3), at the time of her death in 1878. Her husband is identified as 'Micky'. 'Mickey and Kitty' are also referred to on page 21 of the 2nd Maloga report (again cited in Vic 3.6.1 Appendix. 21.3). Micky is elsewhere identified as a 'King' (Cato, 1976:78; Matthews Diary 6th September 1876) and, on his death in 1879, as 'one of the fathers of the Moira tribe' (Vic 3.6.1, Appendix. 21.6). Bagot was born in the claim area in the 1850s and died there in 1934 according to certificate evidence. Matthews, in Mr Maloga, in evidence, identifies him as being 'of the Kailetheban tribe' (one of the Bangerang sub-groups) (photo in Mr Maloga). Treseder (in Harris, sup report) identifies him as from Moira Lakes in the 1850s.

Again, regardless of any ambiguities about his mother (none of which suggest that she came from anywhere outside the claim area), this should be sufficient to draw the inference that Bagot Morgan was a Yorta Yorta man descended from the people of the area at the time of sovereignty. There is no evidence to the contrary and a substantial quantity indicating his association. Olney J., by seeking to deal with the evidence concerning his mother (some of which he has overlooked) rather than Bagot, ignores a great deal of relevant information. Again of course, if one is forced to look at the mother, one could use the information about Bagot himself to draw inferences about her – if he was Yorta Yorta from the claim area, as the evidence indicates, then she must have been too.

Further to those remarks at para 74 and 87 above, this is a good example of the problems caused by Olney J.'s individualisation of the process. By focusing on the mother or mothers of these ancestors, whose identity is uncertain, Olney J. ignores other important information about the men themselves (para. 88–90).

Alfred Morgan is specifically referred to as Yorta Yorta by R.H Mathews (writing around 1900). He was born around 1850 on the evidence presented by Olney J. in para 74, ten years after first settlement and long before Daniel Matthews brought people
from more remote areas to Maloga. He appears to be #82 on the Maloga lists for 1884 (Hagen, Exhibit A67, Appendix. 5.26), where he is identified as 'Moira Tribe'. His marriage and death certificates indicate that he was born within the claim area at Wharparilla (near Echuca). Various contemporary Yorta Yorta witnesses also identify him as Yorta Yorta. There is no contrary evidence. There is no suggestion that he came from outside of the claim area. This should be enough in itself. It is more than reasonable, under such circumstances, to make the inference that he was descended from those occupying the area at the time of Sovereignty. We know enough about Alfred himself for the inference to be easily and sensibly drawn.

The information about Alfred is sufficient to draw inferences about his mother – if Alfred was Yorta Yorta and his father was white – then his mother must also have been Yorta Yorta. Olney J. adds that:

> those who trace their descent through either or both of George Charles and his wife Jenny McCulloch are faced with a similar difficulty as that encountered by the Morgan descendants. Both George and Jenny had non-Aboriginal fathers...no evidence from which any relevant inference can be drawn to establish a connection between either mother and the indigenous inhabitants of the claim area as at 1788 (p. 89).

Again, Olney J. looks to the mother about whom little is directly known rather than the person identified by witnesses as an ancestor about whom more is known. George Charles, on the certificate evidence and the Treseder report (in Harris sup report), was clearly born in the 'original lands' at Wyuna. He is identified as being of the 'Echuca' Tribe in the Maloga lists (Exhibit A67, Appendix. 5.26). Harris (Appendix. 17.3) suggests a birth date of 1858 or 1859 at Wyuna within the original lands.

The evidence is less extensive than in the case of some other ancestors but in the absence of any conflicting materials, how extensive does the evidence have to be? Again, if Kirby J.'s precepts from Mason v Tritton were followed, the evidence would seem sufficient.

In relation to Jenny Charles, Olney J. claims that 'all that is known of Jenny's mother is that she gave birth to Jenny at Benalla (in the claim area) in the late 1850s or 60s' (p. 90). Again, she is known by contemporary Yorta Yorta people to have been a Yorta Yorta woman and there is no evidence to the contrary.

Olney J. also suggests that 'Nothing is known of Margaret Nelson's antecedents except that she was born to the south of the claim area in the early 1860s' (para. 90). Again, contrary to Olney J’s suggestion, there is very significant material concerning Margaret's antecedents contained in the Tindale genealogies (Appendix to Harris first report, Ex 3.6, sheets c12).
Margaret Nelson is identified on sheet c12 of Tindale's genealogies (in evidence) as one of Tindale's informants (age 77 or 78 in June 1938, suggesting a birth date around 1860). Margaret's mother was 'Mary Jane', from 'Station on the little river near Keywar (i.e. Kiewa-RH) Vict. Mr Mitchell's Stn.' Tindale has also added the following annotation after her mother's name, obviously documenting a comment from Margaret herself – 'My people have land as far as Wangaratta'. Thus, Margaret identified 'her people' very clearly in the eastern part of the current claim area some 60 years ago, long before there could be any suggestion of self-interest associated with the outcome of the claim. Margaret's grandmother (bear in mind Margaret herself was born circa 1860) is identified by Tindale (1937–39) as Maryann and her grandfather as King Billy (both of solely Aboriginal descent).

Roderick Hagen:
The descendants of Granny Mag Nelson, in fact, also make their claim as Yorta Yorta people by other means. But I think it is interesting that in this case we have a person who is identified by Tindale quite clearly with the eastern parts of this claim area and who apparently was a quite significant figure in the community generally, also as an antecedent of many of the applicants, in fact. There is another interesting connection in Robinson's material concerning Granny Mag Nelson, Margaret Nelson, in that Robinson, on 11 May 1840, when at Mount Battery in the course of one his trips into the claim area, identifies a woman by the name of Mary-Ann, who he calls a Waaringulum. Mary-Ann, in fact, is the grandmother's name of Granny Mag Nelson. But there is a coincidence not only of name but also of location and, I would suspect, approximate ages between Mary-Ann, on 11 May 1840 at Mount Battery Station, just to the south-east of the claim area (see Hagen, trans (t.) 6269).

All of this material was put before the Court but Olney J.’s comment is simply that 'Nothing is known' of Margaret Nelson's antecedents! This is another example of how Olney J. privileges written evidence over Yorta Yorta knowledge. That is, if there is insufficient evidence in the written sources to support occupation, Yorta Yorta knowledge is treated as less reliable and is disregarded.

Olney J. places stress on the fact that the father of another ancestor, Louisa Frost, was a white person. He then goes on to say that

She was born at Mathoura (within the claim area) in about 1855. There is no evidence to connect her mother Topsy with the claim area apart from the fact that she would have been present at Mathoura when Louisa was born. This is insufficient to justify drawing any inference relating her back to the Indigenous inhabitants of the area in 1788 (para. 91).

Again, the applicants relied on details about Louisa for information about her mother, Topsy:
– Identified as 'Moira Tribe' in Maloga lists (Ex A67, App 5.26 – 9th Report).
– Mother of Florence Atkinson (first child born at Maloga).
– Identified by contemporary claimants as Yorta Yorta (see for example t. 5767).
– Shown, on her death certificate (Vic 1597 for 1893) as having been born 'On the River Murray near Barmah New South Wales'. She is shown as having died at the age of 35 in 1893 (in Vic certs) giving a birth date in the late 1850s.
– Shown by the government official Treseder as born at Mathoura and aged 35 in 1891.

There is a substantial amount of evidence that identifies Louisa as a Yorta Yorta woman from the claim area, and little or nothing contradicting it.

Similar issues arise with the other ancestors rejected by Olney J. In each case there was strong evidence identifying them with our traditional lands and with the Yorta Yorta community in the middle of last century. Despite his early comment (at para. 22) that the depth of Yorta Yorta knowledge 'was most impressive, and for the most part (with only minor exceptions) proved to be accurate', Olney J. makes no reference to relevant Indigenous evidence. A substantial portion of the oral testimony of the senior members of the claimant group was directed towards establishing their genealogical links with earlier generations. The accuracy placed on the genealogical evidence is one thing but its disregard in the reconstruction of Yorta Yorta connections exposes major failures in the Olney J. criteria. Furthermore, the perpetuation of the generally disapproved of stock breeder language of 'full blood, half caste' (at paras 73, 74, 77, 82, 84, 98, 100, 101, 102), without any form of qualification or explanation, does Olney J. no credit and suggests a lack of understanding of, and respect for, Indigenous people.

1.4.3 Traditional Territories

Olney J. suggests that the evidence on tribal boundaries is lacking in 'authoritative answers' and attempts his own reconstruction from the primary evidence by applying 'normal process of analysis and reasoning'. The Judge notes that the 'boundaries on the claim area as shown on the claim map is not reflected in any historic or other records' (para. 63).

It would be remarkable if there was a single document that accurately identified Yorta Yorta boundaries in their entirety. No one had undertaken a specific study of Yorta Yorta territorial interests prior to the claim. Apart from Curr's 1883 partial reconstruction (discussed below) only general descriptions of territorial interests (such as Tindale's Australia wide study and Ian Clark's Victorian surveys, 1988) were available. The same is true of most of mainland Australia. It is rare indeed to find a 'mapping' of traditional boundaries of Indigenous territories by academics that stands up
to serious scrutiny in the course of land claim proceedings. It is not correct, however, to say that boundaries are 'not reflected in any historical or other records'. Taken together, the various available source materials provide a good general confirmation of the lands claimed.

The southeastern, southwestern, and northwestern boundaries of the claim closely approximate those identified by Tindale (1974) in both his map and the text as Yorta Yorta and Pangerang territory). This accounts for approximately two-thirds of the boundary perimeter of the claim, from near Deniliquin in the north, to Kow Swamp in the west, to near Murchison in the south, and to the foothills of the ranges east of Wangaratta in the east (see Figure 2).

Curr's own 1883 map, on which Olney J. places substantial weight, shows the broad 'Bangerang' territory as the western and northern part of the claim area. Curr provides no information about the eastern part of the claim area.

Descriptions from other 19th Century sources of Brough-Smyth, 1878 Parker, 1876 and Robinson, 1843 (in Clark, 1988) are also in general accord with substantial sections of the claim area, though precise boundaries are rarely shown or mentioned.

The writings of Thomas James, 1897 and Ronald Morgan 1952, to whom I shall return, provide information about the location of the Yorta Yorta and neighbouring groups. These and the Yorta Yorta witnesses’ evidence on territorial range and approximations of boundaries were disregarded (see Colin Walker, exhibit A8.1 paras 1–5, 8–9, 17–21, 34 and 38–45, t.1412–1414, 1427–1430, 1562–1578, 1595, 2316–2317; Neville Atkinson Snr t.568–570, 919–926; Ella Anselmi exhibit A8.21 paras 2, 22, 24–30, t.583–588, 688–689, 747–751, 1862–1863; Richard Atkinson t.1774–1796; Osley Patten t.3079–3080; Des Morgan exhibit A8.6 paras 8, 10–13, t.1179–1192, 1196–1202, 3282–3285).

On the basis of perceived differences between locations of local groups identified in Daniel Matthews and Curr, Olney J. concluded (para. 63) that there was 'considerable movement of Aboriginal people away from the country they had occupied at colonisation' a fact which he says 'highlights the difficulty of trying to reconstruct tribal boundaries one or two centuries after the relevant date'.

Olney J.’s speculation that a discrepancy in descriptions of the location of two Yorta Yorta sub-groups by Matthews and Curr was indicative of a 'considerable movement of people' is not capable of withstanding even modest scrutiny. The context of the material in which Matthews and Curr provide their descriptions needs to be taken into account. Matthews may have simply agglomerated the groups in a fashion suitable for the audience at the South Australian Geographical Society in 1899 where he presented the
paper concerned. Curr's description appears in his *Recollections of Squatting in Victoria*, published in 1883 several decades after he left the area. This is not an academic treatise, but a squatter's memories of his youth.

In neither case did anything hang on the accuracy or otherwise of their descriptions. Curr's slightly later map appears in a very broad ranging description of groups in Australia, based largely on correspondence with pastoralists, police officers and public officials in various parts of the continent.

All the locations of which both writers speak fall clearly within the claim area and within all descriptions of the broad Yorta Yorta/Bangerang territory.

As indicated, neither Matthews nor Curr were trained ethnographers. It is simply not intellectually defensible to regard these narrow sub-group boundaries, as provided by either author, as authoritative.

The actual distance of Olney J.'s 'considerable movement', if it had actually occurred, is, to say the least, trivial. It is worth revisiting the descriptions that Olney J. cites to justify his view here (at 63). By the time Daniel Matthews established Maloga mission in 1874 and commenced keeping records of those who came and went to and from the mission, the effect of European settlement in the area had had a devastating effect on the Aboriginal population. In a paper entitled 'Native Tribes of the Upper Murray' which Matthews wrote in 1899 he said:

> In the early part of 1864, when residing at Echuca, Victoria, I was brought into contact with a considerable number of natives of the Bendigo, Terrick Terrick, Loddon, Mount Hope, Gunnawarra and other tribes of Victoria, as well as the remnant of two large tribes in New South Wales – the Walithica and Calthaba, who occupied the territory between Moama and Deniliquin, extending eastward to the Moira Lakes and Edward's River. These tribes in early days were probably large, numbering several hundreds; but owing to the march of civilisation, acquired estates, incursions and reprisals, they gradually became decimated until now, they are mere fragments of tribes, occupying an industrial village of about 200 residents and 1,800 acres of land that I obtained for their use in 1882 from the New South Wales Government (Exhibit Vic 44).

Matthews' reference to 'the Walithica and Calthaba' is significant. According to Curr (*Recollections*, p. 232):

> Adjoining the Bangerang there were two tribes that numbered about fifty individuals each, and spoke the Bangerang language, with some slight difference in, I believe half-a-dozen words only. They called themselves respectively Wollithiga (or occasionally Wollithigan) and Kailtheban, and had no doubt seceded from the Bangerang at a comparatively recent epoch; indeed the Bangerang occasionally spoke of their neighbours in a hesitating sort of way as Bangerang Blacks. The country occupied by the Wollithiga
was at and about the junctions of the Goulburn and Campaspe rivers with the Murray. The country of the Kailtheban was principally on the south side of the Goulburn, extending from Tongala to Toolamba, at which point they came in contact with the Ngooraialum tribe that they called Ooraialum.

The junction of the Campaspe with the Murray (from Curr's description of the Wollithica) is about three miles downstream from Moama (from Matthews description of the combined group) by river, much less than that as the crow flies. Essentially, Matthews locates the groups collectively on the north side of the Murray; Curr locates them primarily (though not exclusively) on the south side along much of the same stretch of river.

It should also be noted that the two groups identified here by Olney J. are 'narrow groups' – the equivalent of 'clans' within the broader Yorta Yorta/Bangerang group. Many of the individuals concerned would have been members of both (by virtue of associations derived from both sets of grandparents) increasing the chances of confusion amongst contemporary white writers.

The groups, the Calthaba/Kailethban and the Wollithiga/Walithica, were not 'tribes'. They were narrow local groups, analogous to clans or bands, a fact agreed upon by all experts called by both sides in the case with the exception of Maddock, who saw them as some poorly specified form of intermediate group. They were groups of the type specifically rejected by Lee J. in *Miriuwung-Gajerrong* and even in the *Gove* case as the relevant level of organisation when Native Title and land issues are being discussed. Perhaps Olney J. is trying to revisit his earlier battles with the High Court over the primacy of clans. It is for reasons such as this that Olney J.'s view of the discussion of the 'labelling' of groups as 'sterile argument' (para. 59) is wrong. Without coming to terms with this issue, his findings must be defective. Effectively, he sidesteps the argument altogether in para. 59, but then uncritically adopts one side of the narrow 'clan' based focus as the basis of his reasoning (at 62).

In 1887, Curr provided a map of his perception of the internal boundaries of the Bangerang in his more scholarly work, *The Australian Race*. On this map Moama (and an extensive area north of the Murray towards Deniliquin) clearly falls within Curr's identification of the 'Wollithica' sub-group territory. For the Wollithica, it would seem that no movement whatsoever is needed to bring Matthews' and Curr's views into line with each other. For the Kailethban (Matthews' 'Calthaba') the discrepancy involves simply the crossing of the Murray, a distance of perhaps 100 metres!

Given the extensive evidence of river crossing, the absence of the river as a boundary, the intermingling of people within these various 'narrow' groups, Olney J. made a great deal out of very little here. Other early writers also place the 'Wollithiga' in various
other locations in the area. Brough-Smyth, for example, locates them west of the Campaspe/Murray junction. The simple answer is probably that the sub-group locations referred to are far from accurate.

Finally, Curr himself lived south of the Murray, while Matthews lived on the NSW side, and the different locations may simply reflect their own personal focus. Olney J.'s attempt to make so much of the discrepancy which he incorrectly perceives between Matthews and Curr on this matter, ignoring a host of other relevant material, highlights the problems which can occur when judges attempt to undertake analysis of complex issues in areas beyond their area of expertise. No experienced historian or social scientist would be likely to repeat the errors that Olney J. made. His failure to understand the context of the documents with which he was dealing here, and his inability to deal properly with the issues of narrow and broad group associations, resulted in the attachment of great weight to a trivial or non-existent 'discrepancy'.

1.5 Acknowledgment and Observance of Customs

The second test used by Olney J. is that the

nature and content of the traditional laws acknowledged, and the traditional customs observed by the Indigenous people in relation to their traditional land must be established (para. 4).

It is apparent from the context, and his dealings with the matter elsewhere, that he is speaking of the laws and customs of the community at the time of sovereignty. This seems to be completely at odds with Toohey's observations, quoted earlier, and with Mirriuwung-Gajerrong, where Lee J. argues that:

It is not a requirement of native title that it be shown that the indigenous community had rules for defining and transmitting the rights of community members in respect of land. Native title follows from the occupation and use of land by an organised society that has a particular relationship with the land. It does not depend on proof of the existence of specific rules that govern the relationships of community members with that land (Mabo (No 2) Brennan J. at 62–63; Toohey J. at 188–191). The existence of laws or customs that determined how the land was controlled or utilised may be assumed from proof that a functioning society occupied the land (Mabo (No. 2) Toohey J. at 187).

Establishing the full nature of laws and customs at the time of sovereignty is probably an impossible task to fulfil with any reliability in any part of Australia, especially if, as Olney J. seems to require, documentary sources are to be favoured over Indigenous knowledge. Indigenous communities at that time left no written records and much of the documentary material produced by white intruders were recorded through their own cultural blinkers. In many cases (as with the Yorta Yorta) such materials were not
produced until many decades after the initial British claim to sovereignty. The claim to sovereignty in fact pre-stayed the first arrival of Europeans by many decades throughout the continent.

Olney J. again applies 'unreasonable and unrealistic' expectations in the Yorta Yorta case. The different approach by Olney J. is of substantial importance, particularly given the manner in which he subsequently makes use of this 'principle' in his judgement.

The traditional laws and customs that the Judge relied on were not those being practised at sovereignty but were those mentioned by a young white squatter who worked in the area some fifty years later. These laws and customs related to: social organisation, family relationships, and other practices, namely, tooth removal, ornamental scarring, conflict resolution, punishment, warfare, subservience of women to men, use of food and burial methods.

Rather than looking at the underlying principles of law and custom, in examining such matters, Olney J. draws on narrow aspects of human behaviour mentioned by Curr. Thus in looking at traditional burial practices, he quotes Curr's description of a burial, identifying the minutiae of the process such as the use of emu feathers and the sitting position for burial. The implication is that unless such practices follow these details today, then Native Title has somehow been abandoned (para. 116). He ignores completely a host of evidence from both Yorta Yorta applicants and expert witnesses concerning more general issues of relevant traditional principle (such as the need for the dead to be buried in Yorta Yorta territory) (see-Chapters 2, 7–9 for elaborate detail on these matters drawn from both oral and documentary sources).

In many cases, too, the matters raised by Olney J. when he cites Curr are typical of general 19th Century stereotypes about the life of the 'savage'. Thus he mentions Curr's discussion of Yorta Yorta man as 'despotic in his own mia-mia or hut'; and the animal-like profligate – 'If anything was left for Tuesday, it was merely that they had been unable to consume it on Monday. In this they were like the beasts of the forest'. Such phrases would tell any person with even basic training in history or the social sciences to be very wary of the source document. Yet, Olney J. puts forward these same samples of a 19th Century squatter's observations as the essence of Yorta Yorta law and custom. Indeed, it would seem the Yorta Yorta today must adopt such practices if we are to have any hope of succeeding.

In comparing Curr's interpretation of some practices observed at colonisation with contemporary practices, the Judge found that because they differ from those described by Curr, Native Title does not exist.
The Judge used the 'tide of history' metaphor to deal a fatal blow to those traditional connections that the Yorta Yorta had maintained. Olney J. declared that Yorta Yorta connections were washed away before the turn of the 19th Century, specifically in 1881 by reason of the petition (paras. 53, 108, 117–118; Appendix. 1).

1.5.1 Anglocentric Approach

In establishing the test for determining Native Title, the Judge set himself on a course of enquiry that was essentially back to front. He not only took a frozen and static approach to Yorta Yorta Native Title, but sourced its origin and content in selective white interpretations. The disregard for Yorta Yorta oral knowledge (54% of the transcript) and the written works of various Yorta Yorta descendants reveals a racist approach to Native Title in the Yorta Yorta case.

The Judge’s reliance on a squatter, Edmund Curr, to elicit traditional Yorta Yorta customs, is monstrously ironic. Curr was one of the first white people to misappropriate Yorta Yorta lands, in similar fraudulent style to that of Batman in 1835 (see Chapter 5). He was a temporary sojourner in Yorta Yorta lands (during the 1840s) and wrote his recollections, apparently without the benefit of any notes, some 40 years later in *Recollections of Squatting in Victoria*, published in 1883 and *The Australian Race*, published in 1886.

Justice Olney speaks of Curr as a person who 'clearly established a degree of rapport with the local Aboriginal people' (para. 53) and whose 'record of his own observations should be accorded considerable weight' (para. 106). What evidence Olney J. uses to establish Curr’s rapport with local Yorta Yorta is not presented, and any reasonable investigation of the facts of Curr’s life militates against this proposition. Indeed, Olney J.’s reliance on Curr’s writings of traditional based Yorta Yorta laws and customs is called into question.

Curr’s reliability as an authoritative source has been dealt with. In light of the weight he is given by Olney J., however, it is useful to further examine some of Curr’s inner prejudices towards the people on whom he is judged such an authority. Giving evidence to the Royal Commission on Aborigines in Victoria in 1877 (some six years before he wrote his recollections), Curr is called on to give evidence on the establishment of Aboriginal reserves in the Murray region. Curr’s view towards Aborigines, which he held from the ‘beginning’, is that he would treat them as children, as they are nothing better. When asked how he would deal with the difficulties associated with removing those who were unwilling to go to a reserve Curr replied:

I do not think there would be too much practical trouble in it. I daresay there might be an instance; but I have gone on the idea from the beginning that those natives are children, and in anything I have recommended I have
inferred that they would be treated as children, made to go to those places and kept there, and if I am asked my advice, I recommend that this should be done: that the blacks should, when necessary be coerced just as we coerce children and lunatics who cannot take care of themselves (Minutes of Evidence from the 1877 Royal Commission on the Aborigines of Victoria: 78).

These are disturbing insights into the mindset of a person whose observations are used to undermine Yorta Yorta Native Title rights. Olney J.’s literal acceptance of Curr against this background (which was in evidence before him in the 1877 Royal Commission report), and the privileging of white sources over the factual evidence led by the claimants, calls for his approach to be brought under serious scrutiny.

No person with any real understanding of Yorta Yorta laws and customs could simultaneously hold the view that Yorta Yorta men and women were the equivalent of children and lunatics. Curr either suited his words to his immediate political and economic purposes or knew very little of the people whose lands he had taken.

In determining the existence of original rights, Olney J. recites Curr's alleged purchase of land from Indigenous occupants for a 'stick of tobacco'. In accepting such narrow and simplistic interpretations of Indigenous land tenure systems, Olney J. falls into the same trap as Curr, by belittling those Indigenous people who were in possession, and failing to deal with their prior rights in a fair and just manner. Curr's observations are used to distort the meaning of land to Yorta Yorta people, similarly to the way the Batman Treaty was used to devalue Wurundjeri people's attempts to accommodate white interests within the traditional lands (Chapter 5). The concept of alienating land and resources for material goods offered by whites distracts from the question of possession at law (NTA s. 223). The alleged exchange of land rights for trivial material goods reinforces the stereotype that Indigenous people were not capable of placing the same value in land ownership as Europeans and ignores the communal and inalienable nature of Indigenous title. In reality, it is extremely unlikely that either party understood the nature of any bargain being struck (if Curr's account was actually based on a real event, and he was not simply inventing a typical 19th Century stereotypical scene to keep his readers entertained). Curr admitted that he did not understand the Yorta Yorta language, or have much interest in their affairs at this time in his life:

neither did it occur to us to take up aboriginal languages, or grapple with the traditions of the ancient and singular race with which we had been brought in contact, or we might have found pleasant and unfailing occupation at once in a rich field for inquiry (Curr, 1965:126).

Yet this is the man on whose views Olney J. placed complete reliance for eliciting traditional based laws and customs.
The selective use of white sources to justify extinguishment arguments and the application of frozen and antiquated notions of Indigenous society is inconsistent with the requirements of Native Title. Moreover it smacks of racism and has the effect of legitimising the status quo.

1.6 Maintenance of Connections

The third test used by Olney J. states that

it must be demonstrated that traditional connection with the land of the ancestors of the claimant group has been substantially maintained since sovereignty was asserted (para. 4–5).

Using this principle together with the previous one, Olney J. effectively sets up a process whereby the claimants must prove the situation as it was in 1788 and establish that their laws and customs have always remained much as they were at that time. Interestingly, this does not seem to be something that the same Judge required in either of his judgements relating to Northern Australia at Hayes (Alice Springs) v Northern Territory (1999) and Yarmirr (The Croker Island Appeals) (1999).

Brennan J. and others provide further guidance about the necessary level of continuity. Brennan J. qualifies the observance of customs by adding that it is only required 'so far as practicable'. He also differentiates between situations where people have been 'physically separated from their traditional land and have lost their connection with it' and those where they have not. The issue has also been examined extensively in other cases and Olney J.'s ultimate interpretation of the meaning of this appears to be the most restrictive. Again, Lee J.'s views seem to be at odds with Olney J.'s judgement, and far more learnedly argued:

Native title that has not been extinguished by action of the Crown, or by extinction of the society that possessed it, will continue where connection with the land is substantially maintained by a community which acknowledges and observes, as far as practicable, laws and customs based on the traditional practices of its predecessors (Ben Ward & Ors, on behalf of Mirriuwung-Gajerrong People (1998)).

Lee notes that this principle, proposed by Brennan in Mabo was endorsed by Lamer CJ. in Delgamuukw (at 257–8) who accepted that there is no need to establish 'an unbroken chain of continuity' (R v Van der Peet at para. 65) between present and prior occupation: The occupation and use of lands may have been disrupted for a time, perhaps as a result of the unwillingness of European colonisers to recognise Aboriginal title. To impose the requirement of continuity too strictly would risk 'undermining the very purposes of s. 35(1) of the Canadian Constitution by perpetuating the historical injustice suffered by
aboriginal peoples at the hands of colonisers who failed to respect aboriginal rights to land' (Lamer CJ. in Delgamuukw at 257–8).

*Mabo* set down the requirement that there must be 'substantial maintenance of the connection', which is equally applicable to proof of title in Canada. *Mabo* also recognised that such activities or practices may be a modern form of exercise of those laws and customs (*Mabo* (No. 2) Deane, Gaudron JJ. at 110; per Toohey J. at 192; *R v Van der Peet* per Lamer CJ. at 553).

Much discussion has focused on the fact that occupation will have changed between the time of sovereignty and the present. The fact that the nature of occupation has changed does not, in the view of authorities other than Olney J., preclude a claim for Native Title as long as a substantial connection between the people and the land is maintained. I have examined the concept of continuity and change, which culminated in the analysis of Yorta Yorta occupation and connections in the *Mabo* sections of Chapters 7–9. In these chapters, Yorta Yorta connections with the claimed land and waters were substantiated in accordance with *Mabo* and the NTA. They focused on the central question of a Native Title enquiry, which is not whether the traditional practices observed today are in the same form as before as if frozen in time. Indigenous title shares the capacity of the common law to evolve and incorporate, as circumstances require. As Toohey J. emphasised, Indigenous society does not surrender Native Title by modifying its way of life (*Mabo* (No. 2) per Toohey J at 192). The Aboriginal laws, customs and traditional practices on which Native Title is based have always been dynamic, not static. The most remarkable feature of Olney J.'s judgement is that he fails to include or discuss this evidence.

Even on the assumption that detailed evidence of laws and customs of the original ancestors is required, Olney J. repeatedly applies (in paras 4, 25 and 117) an entirely new principle concerning Native Title. To him, it is the laws and customs of the community in existence at sovereignty that constitutes the burden on the Crown’s radical title. This cannot be correct. All other decisions indicate that it is the ‘native title’, not the laws and customs, which burden the Crown (eg *Mabo* (No. 2) Brennan J. at 37 and Deane and Gaudron JJ. at 69, derived from several decisions of the Privy Council eg *Amodu Tijani v Secretary*, Southern Nigeria (1921) at 403). For others, Native Title persists though laws and customs change. For Olney J., it is only the original laws and customs that burden the crown.

Olney J. allows for little or no change if a community is to enjoy Native Title, because from his point of view it is those original laws and customs that constitute the burden on the Crown’s title. Any change amounts to at least a partial loss of title. This position is consistent with the Judge’s understanding of the frozen, exclusive and extremely narrow
view of Native Title. The paragraph 117 test is a repeat of the principle outlined in paragraph 25 of his judgment where he says: 'It is the descendants of the people who occupied the area in 1788, and whose traditional laws and customs in relation to the land became, at the time of sovereignty, a burden on the radical title'.

Olney J. espouses a related test in the last sentence of paragraph 118 and the second sentence of paragraph 129. That is, it is the same traditional laws and customs of those occupying the land at the acquisition of sovereignty that must be exercised by their descendants. One might be forgiven for thinking that, in Olney J.’s view, to succeed before him the applicants should be dressed in tribal regalia performing the same cultural practices as those interpreted by a white pastoralist one hundred and fifty years ago!

1. 6.1 Constructing Barriers

Olney J.’s approach fits neatly into the general framework established at the outset of this thesis. Whereas Mabo found that Native Title has survived British sovereignty, the sequential barriers that have been put in front of Native Title have become a major impediment. Olney J.’s attempts to construct the same barriers in the Yorta Yorta case is graphically illustrated in the test he uses for measuring the extent to which Native Title has survived. Olney J. states that:

> the claimed rights and interests must be rights and interests recognised by the common law of Australia...it is not until each of these elements has been proved that it will be possible to determine whether the laws acknowledged and the customs observed by a contemporary clan, group or community should be afforded the protection of Australian law (para. 4–5).

Olney J.’s test and his underlying reasoning support the sequential hurdles approach. If you fall at any one then it is unnecessary to move on to the next component. This not only saves a lot of deliberation time but the hurdles he proposes are so baldly stated, and so uninformed, that they would probably pose an insuperable barrier to anyone seeking to mount a Native Title claim anywhere in Australia.

Establishing biological descent and cultural continuity from sovereignty for any Indigenous person in the more remote parts of Australia would ostensibly also prove to be impossible, particularly when we see the manner in which Olney J. treats the specifics of the Yorta Yorta case later in his judgement. Olney J., as we shall see, overcomes this hurdle by posing quite different tests for those in more remote areas. Lee's discussion of these issues is far more informative and far more in accord with the spirit of both Mabo and the Canadian cases.

The difference between Olney J.’s approach in Yorta Yorta and that which he took in the Hayes (Alice Springs) Native Title claim is worthy of comment. The test that he
posed in *Alice Springs* was quite different to that of the Yorta Yorta, which brings out the assumption of the authentic Aboriginal identity, which is the sub-text to Olney J.’s judgement.

In *Hayes (Alice Springs)* he says:

> The resolution of an application for a determination of native title will initially require the Court to inquire into and make findings concerning:

> – the identity of the claimant group and its relationship with the indigenous inhabitants of the land in question.

> – the geographical location to the traditional lands of the claimant group.

> – the nature of the traditional laws and customs of the claimant group in relation to their traditional land.

In the event that the claimant group establishes the existence of traditional rights and interests in relation to the claimed land, it will then be necessary to consider the extent, if any, to which those rights and interests are recognised by the common law (*Hayes v Northern Territory* (1999) at para. 10).

This is a much simpler and less prescriptive formula than that which Olney J. imposed on the Yorta Yorta. It revisits the question of whether Olney J., in his application of the law, differentiates between Indigenous people of the more remote parts of Australia and those of us that have endured the full brunt of white occupation for much longer. The Yorta Yorta, it would seem, not only have had to carry the weight of a more onerous and longer form of colonialism, but also have to meet a far more difficult standard of proof to that required in the more remote regions.

Furthermore, when Olney J. begins to apply the principles that he enumerates, he ignores the applicants' evidence that would meet his criteria. There is a marked absence of any discussion of the legal aspects of the issue of social change, despite the fact that he is dealing with the first case to be heard concerning the longer settled parts of Australia, despite the fact that very extensive arguments, based on legal precedent, were put to him concerning such matters, and despite the fact that specific evidence relating to such issues was also presented by expert witnesses on both sides. In assessing these complex issues, Olney J. disregards the extensive Indigenous and expert evidence, and chooses instead to follow his own naive reading of the reminiscences of one 19th Century pastoralist and a 19th Century missionary.

### 1.6.2 Dichotomy of Aboriginality Perpetuated

As indicated, in the literature of Identity politics in Chapters 1–2, Indigenous people in southeastern Australia commonly experience the identity-denying scepticism of ill-informed, and often ill-educated, members of the white community, who tend to think
of ‘real’ Aboriginal people as only those who come from the remote areas of Australia. It is alarming in the extreme when similar views seem to have intruded into the very heart of the Native Title process (see Chapter 2 for discussion on the concept of Aboriginality in which I was extra cautious to avoid perpetuating misconceptions). It would seem that Olney J.’s perceptions of Aboriginality, shaped by his experience in the Northern Territory has been imported into the Yorta Yorta context. The difference between his Northern Territory judgements and the Yorta Yorta is very telling. It makes one realise that in the former cases he is assuming that the questions of biological descent and cultural continuity are already resolved, whereas in the latter he obviously has doubts in advance about these issues. It is almost as if he proceeds on the presumption that the Yorta Yorta claim is fraudulent and the claimants are guilty until proven innocent.

1.7 Use of Documentary Evidence to Justify Extinguishment

1.7.1 The 1881 Land Claim Petition

After using white persons' documentary evidence to source traditional Yorta Yorta laws and customs and the ‘tide of history’ euphemism to wash away the underlying violence and conflict over land, Olney J. then applies the final blow to Yorta Yorta Native Title. The Judge isolates a previous claim from the Yorta Yorta struggle for land, and uses this to support his finding that ‘there was no evidence that the same practices were exercised after 1851’. Olney J. at paragraphs 119–20 refers to a claim lodged in 1881 by forty-two Aboriginal people resident at the Maloga Mission (see Appendix. 1, Chronology of Past Claims, No 2.4: Further Attempts by Matthews to Secure Land from Victorian Authorities 1881–1887).

The claim requested from the Governor of New South Wales a grant of land to cultivate and raise stock to settle down to more orderly habits of industry. The petition also stated the petitioner's desire to change 'our old mode of life' (para. 120). The petitioners included some of the children of those ancestors found to be 'indigenous inhabitants' for the purposes of the present application. Olney J. uses this claim to conclude that:

It is clear that by 1881 those through whom the claimant group now seeks to establish native title were no longer in possession of the tribal lands and had, by 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; and the dispossession of the original inhabitants and their descendants has continued to the present time (para. 121).

This particular attempt at land justice by the Yorta Yorta needs to be viewed in its original context. The 1881 claim was inspired in part by the southern neighbours of the Yorta Yorta, the Taungerong and Wurundjeri, who were successful in gaining some
land to settle on in the 1860s. This was an adaptive strategy aimed at utilising the land for the dual purpose of farming and for maintaining traditional connections with the ancestral lands and resources (see Chapters 3–4). Indeed, it was an attempt to carve out a niche within an economy that economist Dr Alford says 'denied Indigenous people the means of existence' (Alford, 1999:40). It is no coincidence that one of the principal petitioners was the son of Wurundjeri headman, William Barak, who was involved in the neighbouring land struggle. It is ironic that the only Yorta Yorta land gained from the century of claims was the original 1800 acres of reserve land that was returned as a result of the Matthew’s petition. The land was part of the reserve lands being set aside for the benefit of Indigenous occupants at the time, which became Cummeragunja. But when considered against the inherent rights that the Yorta Yorta continued to assert into the 20th Century, it could only be seen as a small down-payment for large-scale land theft and the non-recognition of inherent rights (see Appendix. 1). It goes to the heart of those matters that William Cooper asserted, quoted at the outset of the thesis (Chapter 1). When one considers the way the petition has been construed to support the Judge’s rationale of Native Title loss, it seems that the Anglo-legal system has offered our people two choices: survival with no Native Title rights, or extinction (Barwick, 1972:47–8; Case, 1999: 18–19; Cato, 1976:280).

The wording of the petition upon which Olney J. placed great stress was clearly provided by Daniel Matthews, written in a style of language that would persuade the authorities of the time. Indeed, a style of language that Indigenous people have come to master over the years. Using language as a means to achieve ends, however, does not imply relinquishment of inherent rights (see Pearson, Dodson, Mansell, Langton, Yunupingu and Yu in Yunupingu, 1997; Watson, 1999).

Matthews' diaries indicate that he wrote the petition in Sydney without the input from Yorta Yorta people: 'May 25th ...To Mr. Palmer's office preparing the petition from our men at Maloga for land...' and, 'After dinner to Mr. Palmer's office preparing petition from blacks and plan of land etc’ (Matthews, D., 25 May 1881 and 17 June 1881). It is also clear that most Yorta Yorta people, living in various parts of their traditional territories, were not signatories to the petition. Indeed, neither of the Yorta Yorta ancestors accepted by Olney J. as having a legitimate connection with the area signed it, though both were living at Maloga at the time (see Kitty Atkinson/Cooper and Edward Walker, at para. 104).

Under these circumstances, it is clear that Olney J placed disproportionate weight on this document, using it to deny Yorta Yorta rights. When one considers the immense quantity and quality of other material presented in the course of the claim, ignored
totally in Olney J's decision, his interpretation of the petition gives rise to serious misgivings about his administration of the law in the Yorta Yorta case.

1.8 Privileging European Sources

Let us look briefly again at some of the material that Olney J. chose to ignore and the issue of privileging European written sources over and above Yorta Yorta knowledge (outlined in Chapters 7–9 and above).

There was abundant evidence to the effect that the Yorta Yorta had not been dispersed since the time of colonial contact in the mid-1800s. They maintained a cohesive community, with a common history centred upon Maloga Mission, Cummeragunja and the surrounding areas. They and their ancestors, for example, maintained a continuing association with the waters of the Goulburn River and the Murray River, and the surrounding lands and waters, including but not limited to the land and waters of the Barmah Forest and Lake, the Moira Forest and Lake, and forest areas around Echuca, Shepparton and Mooroolbark where they had fished, hunted, camped, and worked on surrounding pastoral stations, and do so until this day (see Figure 7). Olney J. ignores all of this.

He made no mention of the continued maintenance of connections with country, explained at sites and places where Yorta Yorta forbears camped, utilising resources for artefacts and medicinal purposes and other cultural activities. He made no mention of the letters written by William Cooper, Shadrach James and others on behalf of Yorta Yorta people requesting land justice in the 1880s, including claims to the land as belonging to the Yorta Yorta by divine right, and no mention of the continued maintenance of connections with country through activities such as fishing and hunting.

Yorta Yorta witnesses gave extensive accounts of Cummeragunja history from the 1920s to the present but Olney J. does not refer to the evidence, instead providing a bare bones institutional history devoid of all detail about the actual lifestyle, aspirations and cultural values of people during this period. For him, it is all irrelevant because the petition (written by Matthew's and signed by some Yorta Yorta men) is sufficient to destroy Yorta Yorta claims in their entirety when it indicates that petitioner's desire to 'change our old mode of life' (para.121). It is almost impossible to believe that Olney J. is sufficiently naive to accept that this single dubious sentence counts for more than a hundred and fifty years of Yorta Yorta struggle.

Olney J. also chose to ignore completely the evidence that was presented to him concerning Yorta Yorta residence at other places within the eastern section of the original tribal lands at Moodamere, Ulupna, and Wangaratta. The evidence that went to the heart of the proof requirements by the following witnesses was disregarded in

Every detail that the Yorta Yorta used to demonstrate their ongoing connections has been stripped from the Judge's summary. Justice Olney's approach is completely at odds with Justice Toohey's recommendation that those traditional laws and customs that were being examined 'must be understood from the point of view of the members of the society'. From a Yorta Yorta perspective, Olney J.'s judgement lacks both logic and sensitivity. It ignores the weight of the evidence and it demonstrates a complete failure to come to terms with cross-cultural discourses (Mabo (No. 2) Toohey J. at 188).

The petition was selectively isolated from other Yorta Yorta claims. These were all about land justice and reparation for the abrogation of prior rights. The need to secure land to settle on and develop agricultural practices was simply an intelligent political strategy adapted to the circumstances of the time. Like the previous claims, it was aimed at securing some land so that the Yorta Yorta could survive as a people, which is precisely what it has enabled them to do. It says nothing about the loss of traditional interests or abandonment of traditional rights (Appendix. 1).

One of the implications of Olney J.'s approach to the petition and the writings of Curr and Matthews is that if those seeking to oppose Native Title claims demonstrate a time since the British claim to sovereignty for which there is an absence of evidence concerning 'continuity', or a single instance in which some Indigenous people appear to have indicated a desire to be accepted into mainstream society (no matter whether this overture is accepted or not, and no matter whether the author of the document supposedly indicating this desire is black or white), then they will have succeeded in undermining their original rights.

Kerruish and Perrin have suggested that Olney J.'s use of the 1881 petition and other non-Aboriginal sources to determine Indigenous title amounts to a 'tour de force in distortion' (Kerruish and Perrin, 1999). From an Indigenous perspective, it is difficult to disagree. If 'Native Title' is to have any meaning, and if the relationship between Indigenous and non-Indigenous Australians is to ever be set on a more equal footing, it is critical that those charged with the responsibility of being agents of the law are able
to set aside their prejudices and operate in a logical and just manner. Olney J.’s use of the 1881 petition clearly demonstrates that we have a long way to travel before such a point is reached.

1. 8.1 Exclusion of Oral Knowledge

Justice Olney at paragraph 21 regards the oral evidence of many of the applicants’ witnesses and particularly the more senior members as credible and compelling but regards the testimony of some of the younger members as

..less impressive because oral tradition passed down from generation to generation does not gain in strength or credit through embellishment..and for this reason much of the testimony of the more articulate younger witnesses has not assisted the applicants' case.

Why did Olney J. place so much faith in non-Indigenous writers over and above Indigenous knowledge, and why does he make such a sharp distinction between the way the knowledge is being articulated?

The role of oral evidence in Aboriginal land claims is discussed by Lamer CJ. in Delgamuukw v British Columbia (1997) 153 DLR (4th) 193 at 229–30 and in Mirriuwung-Gajerrong (1998) by Justice Lee who held that, in determining whether the degree of presence on the land was sufficient

to ground a claim to native title it is first necessary to look at the question from the standpoint of the indigenous community and the expression necessarily implies that the words are to be understood from an Aboriginal perspective, not constrained by jurisprudential concepts and there can be no suggestion of unfairness in a trial process in which Aboriginal applicants are permitted to present their case through the use of oral histories and by reference to received knowledge (Mirriuwung-Gajerrong (1998) at 29, 32–3).

The disregard of Yorta Yorta oral knowledge is at odds with those cases. Olney J.’s decision to treat oral knowledge as being less credible than the written record is unjustified (at 59–60, para. 106).

If the weight of the knowledge (drawn from over 55 witnesses) conveys a consistent pattern of connections with country, it cannot be so simply disregarded (see extracts of oral evidence presented in Chapters 7–9). There may be differences in the manner in which individuals articulate the knowledge, but if there is consistency in its content being transmitted by a cross-section of the community, it deserves to be accorded due weight. (see analysis of oral knowledge in Chapter 1 at 1.6.1).

The need to assess the claim against the totality of evidence has been ignored by Olney J. As indicated, some aspects of the Ethnographic record, including Curr, may be of relevance but to give it a superior status to all other materials seriously distorts the
claims process. Moreover, the use of highly selective knowledge to make judgements about present day Indigenous connections is very dangerous. It has serious implications and can be used in a mercenary way to undermine the cultural identity and integrity that the Yorta Yorta has fought to maintain (Chapters 7 and 11).

1. 8.2 Embellishment Allegation

The Judge regarded 'the testimony of some of the younger witnesses as less impressive' on the basis that... 'oral knowledge does not gain in strength or credit through the embellishment by the recipients of the tradition and for this reason much of the testimony of several of the more articulate younger witnesses has not assisted the applicants case' (paras 21–25).

Olney J’s dismissal of oral knowledge because of its unspecified embellishment is not qualified, and because this broad allegation is left up in the air we too are left guessing as to whom he was referring. Neville Atkinson, Darren Atkinson, Damien Bulled, Monica Morgan, Denise Morgan, Shane Walker, May Walker and Hilda Walker are in their thirties and forties. As their statements and the 'more senior' Yorta Yorta witnesses verify, the Yorta Yorta are very articulate. They speak with a similar air of confidence and conviction to that of their ancestors (see Chapters 7–9 on Witnesses’ evidence to Court, 1997–1998).

The fact that younger people have a more poetic turn of phrase, have generally been better educated than their parents and have actively pursued knowledge of their past should not be held against them in this manner. Nor should their ability to articulate their history the way it has been passed on be seen as diminishing the quality of the knowledge. On the question of embellishment, it would be more appropriate to apply such an allegation to the likes of Curr. Having forty years to reflect on the past and leaving no records, notes or diaries to cross-check for accuracy, Curr is surely a far more legitimate target for the allegation that Olney J. claims and seems to hold against the Yorta Yorta as a whole. Olney J.’s allegation of embellishment is not only misplaced but when considered against the weight placed on Curr, the same question revisits and indeed exposes the rationale of his judgement. The question of why the senior evidence in the Croker Island Case was accepted and rejected in the Yorta Yorta case is unexplained.

1. 8.3 Yorta Yorta Authorities Ignored

The privileging of white materials is all the more remarkable when one considers the body of material written by Yorta Yorta people. They were in a better position to understand traditional Yorta Yorta connections with country than either of Olney J.’s favoured 'authorities'. The writings of Thomas Shadrach James, who married into the
Yorta Yorta, and Yorta Yorta ancestors Ronald Morgan and Theresa Clements are good examples (see James, 1897; Clements, n.d.; Morgan, 1952).

Their evidence was before the Court. Thomas James’ kinship with one of the original ancestors (Granny Kitty) gave him far greater access to knowledge than other non-Indigenous people. Grandpa James lived with the community for forty-two years, compared to Curr's intermittent ten-year association. His relationship with the community and his record of accomplishment as a leader, teacher and doctor from 1880 to 1922 is exemplary. The trust gained over this period, from the community and the opportunity to observe and learn from the people, would have provided him with a unique insight into local Yorta Yorta culture. It was this degree of rapport that enabled James to write on aspects of traditional based customs and Yorta Yorta land relationships. The Judge chose to ignore this evidence.

Ronald Morgan, born in the early 1900s was able to observe and document many aspects of Yorta Yorta connections, including a description of original territories, family groups and stories relating to laws, customs and site locations, some of which correlated with the oral evidence. Theresa Clements, born in the 1880s, discussed important aspects of family organisation and occupation of the land in the eastern part of the claim area, which she wrote at the time of the Maloga Mission (1874-1888). Olney J. ignored this material in his judgement.

I collected oral knowledge on the History of Cummeragunja in the late 1970s and early 80s, which culminated in a manuscript called 'A Picture from the Other Side' (1981). The manuscript did not focus specifically on Native Title, but much of the information was about past and present connections with the claim area. These sources, that went to the heart of the subject matter, were presented to the Court in support of the Yorta Yorta claim, but were treated as less authoritative than white sources (James, 1897, Letters to R.H Mathews, 27 September 1897, and with J. Chanter on Yorta Yorta language; Atkinson, W., 1981a: 79–84; Barwick, 1979:111; Jackomos and Fowell, 1991: 176–8; Cato, 1976:97; Goodall, 1996:129–30; Mavis Thorpe Clark, 1979:25; Morgan, 1952:1–25).

Olney J. says that the Court will have regard only to evidence that is relevant, probative and cogent (para. 17). But Curr alone, a highly questionable source, is used to verify traditional Yorta Yorta laws and customs. From both an academic and Indigenous perspective, Curr has far less probative value than the James, Morgan, Clements and Atkinson sources. At the very least one can not suggest that the Curr materials provide a cogent or compelling proof of the early contact situation without at least comparing them with the other written sources and the oral knowledge.
Olney J.’s dismissal of the Yorta Yorta oral evidence is at odds with the weight that he gave to similar material in *Mary Yammir & Ors (The Croker Island Case)*, (1998). There, Olney J. placed considerable reliance on the evidence of 'the most senior witnesses' and accepted it as 'credible' and 'relied on with some confidence' (*Mary Yammir & Ors* (1998) CLR 1: 40–1, 45–6). While Olney J. indicates in his judgement that he placed some degree of confidence in the senior Yorta Yorta witnesses whose evidence is regarded as 'credible and compelling,' its content is completely ignored in the elaboration of his decision.

**1.9 Olney J.’s Irritation at the Proceedings**

Kerruish and Perrin (1999), critique Olney J.’s treatment of the evidence and the Native Title proceedings. They argue that the proceedings are 'littered with the record of the Judge's own extreme irritation'. This observation, coming from those who were not active participants in the case nor were privy to the degree of scrutiny that the Yorta Yorta were subjected to, is compelling. The following passage from the Judge's decision reflects the nature of this allegation, in relation to the way Yorta Yorta witnesses were treated:

> Another unfortunate aspect of much of the applicants' evidence was frequent, and in some instances, prolonged, outbursts of what can only be regarded as the righteous indignation of some witnesses at the treatment they, and their forebears, have suffered at the hands of the colonial, and later various State, authorities. As I have commented earlier, this case is not about righting the wrongs of the past, rather it has a very narrow focus directed to determining whether native title rights and interests in relation to land enjoyed by the original inhabitants of the area in question have survived to be recognised and enforced under the contemporary law of Australia (para. 21).

Olney J.’s comments here, in light of Kerruish and Perrin's analysis, highlights the antagonistic and often 'putting-down' nature of the Native Title process (Chapter 6). It also reinforces my own perceptions of Olney J.’s adjudication of the YYNTC. This was manifested by the Judge's impatience with witnesses, by his frequent sighs of frustration when the case was not progressing in accordance with his expectations, and by the protection given to some of the respondent’s witnesses when they were under cross-examination.

History demonstrates that the Yorta Yorta have been forever explaining their case. The present claim cannot be separated from the past, nor can it be isolated from previous claims (see Appendix. 1 and Chapters 2–3). Olney J.’s approach suggests an inability to 'take account of the customary and cultural concerns of Aboriginal peoples'. It is the sort of comment that helps to explain the contempt that many Indigenous people (including myself) often feel towards the Anglo-legal system. It is the way that Judges, as agents of
the law, administer the law in relation to Indigenous justice that is an ongoing problem. The preamble of the Act would seem to suggest that 'righting the wrongs of the past' was, in fact, one of the main functions of the law in the administration of justice. It recognised that 'it is particularly important to ensure that native titleholders are now able to enjoy fully their rights and interests, which under the common law of Australia need to be significantly supplemented' (NTA at 3).

One is again reminded of the words of Brennan J., Deane and Gaudron JJ. (see Chapters 3 and 5) in which the values of justice, equality and full respect of Indigenous property rights were held to be the guiding principles of Native Title at common law. One is also reminded of the human rights principles recognised by a fellow Judge in the same jurisdiction. Justice North in Mirriuwung-Gajerong (1999) and the Karajarri Claim (Kimberleys) (2000) held fundamental human rights to be 'par excellence' in the administration of justice (Banham, 2000). Unfortunately these principles seem to have had little influence in Olney J.'s decision and again highlight the narrow and racist approach taken in the Yorta Yorta case (NTA; Mabo (No. 2) Brennan J at 40–41; Bartlett, 1993:11–12; Bartlett, 1999:408–26).

Much of the material which Olney J. decried as 'frequent...and prolonged ... outbursts of ... righteous indignation' was, in fact, highly relevant. It went to the question of the constraints placed on Indigenous people in their pursuit of traditional customs 'so far as practicable', or in Brennan's words it helped to define the 'practicability'. Other evidence of this type helped to emphasise the strength of Yorta Yorta ties to the land. Surely, when people refuse to be assimilated into the dominant Anglo culture, despite the often extreme pressure exerted upon them, an indication is provided of the strength of their ties to their own cultural background and way of life. In many cases this evidence also went directly to the continued connection of people with their lands. Forced out of missions and reserves by the repressiveness of the circumstances, Yorta Yorta people continued to camp on the claimed lands, used bush resources for housing, relied on bush foods for sustenance and survival and fought a prolonged political struggle to hold onto links with country (see Chapters 3–5 and 8–9).

'Righteous indignation' by the Yorta Yorta reflects the way the case was conducted rather than the manner in which the evidence was articulated. The adoption of what Olney J. describes as 'innovative procedures' under the Court's obligations under NTA s. 82 are exemplary innovations but whether 'the whole trial was conducted in a manner consistent with this section' is called into serious question (para. 15). Indeed the expectations that were imposed on the Yorta Yorta by the Native Title process need reviewing. In hindsight, the lack of trust demonstrated by witnesses in the Judge's
treatment of witnesses and of the oral knowledge on sensitive cultural matters would appear to be vindicated (see Chapter 7).

In the recent Full Bench Federal Court appeal decision over Olney J.'s decision in Croker Island (Commonwealth v. Yarmirr (1998)) Justice Merkell at 344 remarks:

The second difficult concept relates to the circumstances in which it might be said that there has been loss of connection by reason of an 'abandoning of law and customs based on tradition' (Mabo at 60 per Brennan J) and therefore non-observance of those traditions. Plainly, abandonment does not arise where non-observance of laws and customs occurs in circumstances where a requirement of effective observance is unrealistic. Prior to the decision in Mabo, the common law did not recognise any native title right or interest of the indigenous population in Australia in traditionally occupied land (see the case at 431–2).

It would 'perpetuate injustice' if the courts, when considering the issue of continued observance of custom, failed to give due recognition to the fact that prior to Mabo the prevailing notion of terra nullius characterised: 'the indigenous inhabitants of the Australian colonies as people too low in the scale of social organisation to be acknowledged as possessing rights and interests in land' (Mabo at 58 per Brennan J.) Further, as was said in the joint judgment in the Native Title Act case at 431–2, the judicial treatment of the desert as 'uninhabited' resulted in Aboriginal title to land being 'ignored'. Finally, as was pointed out by Senior Counsel for the claimant group, from when sovereignty was acquired by the British Crown until the decision in Mabo it was not open, legally or practically, to the Indigenous people to require that settlers recognise or respect their traditional law or customs. Thus, when the issue of continued acknowledgment or observance of laws and customs in relation to land arises for consideration, the extent to which that acknowledgment or observance has diminished or changed may require some consideration of whether the diminution or change falls short of abandonment but, rather, came about by reason of conditions, including non-recognition of any Native Title, which were externally imposed on the Indigenous population. As was pointed out by Brennan J. in Mabo, one reason for the requirement of a 'clear and plain intention' to extinguish Native Title was the gravity of the 'consequences to Indigenous inhabitants' of the extinguishment of their traditional rights and interests in land (Mabo (No. 2), Brennan J. at 46). The same consideration dictates that a decision that Indigenous inhabitants have lost the general nature of their connection to their land should not be arrived at lightly.

Merkell clearly contemplates the great relevance of material which Olney J. simply dismisses as 'righteous indignation'. This evidence from the claimants went to the very heart of the impediments placed in the way of the maintenance of traditional law and custom.
By contrast, Olney J. says that he was 'very favourably impressed' with the way the evidence was presented by the respondents and 'accepted as credible the expressions of opinion of witnesses familiar with the processes relating to land tenure histories where documentation was not available' (at 22–3). An absence of documentation, it seems, was excusable and replaceable by oral testimony when it related to matters such as western land title, but inexcusable when it related to Yorta Yorta law and custom. Essentially Olney J. stood on its head the primarily documentary basis of western title systems and the oral basis of Yorta Yorta culture.

The degree of scrutiny applied to the respondents and the absence of evidence relating to the central issue of land was excusable but the same standards were not applied to the applicants' evidence. There were other irritations manifested in the Judge's behaviour and body language, particularly towards the latter part of the case, which gave the impression that the decision was a fait accompli and the Yorta Yorta were merely going through the motions (Yorta Yorta Native Title Committee meetings, Arnold Bloch Leibler Offices, before and at the end of the November hearings, 1998).

### 1.10 Continuity and Tradition Revisited

Returning to the crucial issue of interpreting Indigenous culture and the interface between Anglo and Indigenous law, one finds that this is not a new phenomenon to Olney J. The Judge's struggle to find a balance between the two legal systems is highlighted in Chapter 5. It was Justice Olney who raised the conflictual problem in a discussion with Francesca Merlan (in *Claims to Knowledge, Claims to Country*, 1994) by expressing fear as to how judges, like himself, could arrive at a decision about Native Title. Justice Olney compares the openness of Native Title to the specific criteria supplied by the Northern Territory statute, the *Aboriginal Land Rights Act 1976* (NT).

He explains that he does not want to make the Native Title definition more precise, but that he foresees difficulties in making a decision. Merlan took up these concerns. She referred to Justice Toohey's interpretation in the 1981 *Finniss River case*, where 'Toohey valued continuity with the contested areas in a particular mode' and

thus loosened the notion of ‘tradition’ from its often-found moorings in priority in time and stability in space, preferring to interpret it in terms of continuity in a particular mode (Merlan, 1994:21).

Merlan rejected the Court's tendency to seek out criteria in old (anthropological) authorities that often have ‘a very systemic and totalising view of Aboriginal society’ (Merlan, 1994:23). Instead, she claims that:

[t]he most useful information [about ‘laws and customs’] is likely to be relatively recent, from sources (including Aboriginal accounts) concerned to document not only those social forms most highly objectifiable and indeed
often objectified by Aborigines, but also to establish the sorts of understandings that respondents had of the conditions of their actions, including the giving of that very information' (Merlan, 1994:23).

Dr Rose offers a suggestion whereby proof of Native Title could come from showing the reproduction of a given social practice thereby showing its continuity through time (in Merlan, 1994:29). In dealing with the Yorta Yorta claim, Justice Olney ignores the scholarly analysis offered by Merlan and Rose and completely disregards the evidence put to him on a range of matters including burial practices. Instead he commits the very error that Merlan cautions against: ‘So as with ‘tradition’, the phrase ‘laws and customs’ cannot be understood to point to a particular fixed body of lore’ (Merlan, 1994:23–4).

The problems of interpretation rest on translating Aboriginal law into Anglo-Australian legal terms. Judges must show flexibility in allowing different kinds of evidence to be presented, such as oral traditions, testimony about sacred sites, creation stories and so on. Even more importantly, Judges must be aware of the possible ways of evaluating this type of evidence. Without the necessary training, judges might not be able to recognise the full worth of such non-Anglo-Australian evidence. This is what appears to have happened with the Yorta Yorta case. Despite Olney J.’s participation in the 1994 Australian Anthropological Society’s discussion, the Judge has shown no ability to deal properly with non-western forms of knowledge and evidence. He has done that which he cautioned judges against, that is, to act as ‘fact-finders’ in cases that demand flexibility and broad understanding. Olney J.’s reliance on the written records of a white squatter and a missionary, coupled with his inability to handle the evidence provided by Yorta Yorta witnesses, has put him in a position where he cannot make a well-informed decision.

1.11 Conclusion

I have argued that the approach chosen by Olney J. in the Yorta Yorta case was erroneous and arbitrary as a matter of law, and racist in the way that white sources were privileged over Yorta Yorta knowledge. I also argued that preconceived notions of Aboriginality were imported into the Yorta Yorta context to infer that the Yorta Yorta ceded their original rights before the end of the 19th Century. The benevolent offering of a small piece of land in response to Yorta Yorta political agitation for traditional land and resources, and for the purpose of protection and survival, was construed to support this proposition.

Indigenous groups must be mindful of the future implications of these aspects of Olney J.’s decision. If, for example, an Indigenous community possessing recognised Native Title decides in future years to use its land for farming or tourism it may, relinquish its rights, according to Olney J’s interpretation. Olney J.’s judgement not only seeks to
impose a 'frozen' view of the past, it also has the potential to 'freeze' the future. The NTA (s. 13.1.5) allows for the revocation of a determination of Native Title where 'events have taken place since the determination was made that have caused the determination no longer to be correct'. This would seem to provide ample scope for any judge following Olney J.'s line in the Yorta Yorta case to decide that any change in economic or cultural life is sufficient to destroy Native Title.

The sequential/structural barriers to achieving land justice in light of Mabo were identified. These were acted out in the Yorta Yorta case, by the literal translation of the 'tide of history' and by the selective misconstruction of the '1881 petition'. That is, they were used to justify extinguishment arguments, to privilege white knowledge over that of the Yorta Yorta, to deny Yorta Yorta equality and justice before the law, and to maintain the status quo within the claim area. These matters will be elaborated upon in the summary and conclusions.

2. Analysis of Yorta Yorta Struggle

This section analyses the current state of the Yorta Yorta struggle, and identifies the main barriers to land justice under existing politico-legal processes. It assesses the Yorta Yorta Native Title Claim (YYNTC) against the principles of equality and justice before the law and analyses the extent to which existing land interests in regional Australia are prepared to reconcile their interests with Indigenous title. The chapter emphasises the way that the Native Title industry has usurped Indigenous voices, and argues that the human rights principles of racial equality and justice were not delivered in the YYNTC. It concludes by arguing that the power dynamics of domination, and racial inequality are key impediments to Indigenous land justice that have been perpetuated in the Yorta Yorta case.

2.1 Native Title Outcomes 1992–99

Nearly a decade has passed since the High Court recognised the existence of Native Title at common law in Australia (Mabo (No. 2) 1992). The current situation is that the land returned in Australia since Mabo has been minuscule. For those Indigenous people who have been waiting for over two centuries for land justice, it is a poor reflection on Australia's legal and political institutions. The lack of formal outcomes is experienced against a backdrop of community hostility and antipathy towards Indigenous rights (<www.nntt.gov.au>; Age 10 October 1996).

Justice Olney’s decision, coming at the end of years of scrutiny of the Yorta Yorta people, and the subjugation of their voices to those of outsiders, made the 18th of December 1998 a sad day for the Yorta Yorta. Much of the sadness remains, but being
familiar with similar setbacks, and belonging to such a resilient group of fighters, the struggle continues.

The Native Title process has been emotionally and physically draining. Claimants are locked into a gruelling and often uncertain process for a significant duration. The first substantive Native Title cases to be heard on their merits following *Mabo* were expected to assist other claims, at common law hearings and at mediation, but the dismal returns have greatly heightened Indigenous cynicism about the process as a whole.

### 2.2 Reflections on Current Land Status

As I demonstrated in Chapter 4, State and Commonwealth governments have refused to recognise prior Indigenous rights and to apply fair and just principles of restitution for the confiscation of property. To date, the only lands returned to the Yorta Yorta are a little over half of the original 2,965 acres of Cummeragunja lands (1800 acres). It was this land that Justice Olney construed as implying the relinquishment of Yorta Yorta rights. The land was reserved specifically for Aboriginal use, but the majority was leased to Europeans up to the 1950s. In 21st Century Australian society, we have less land than the reserve provided at the turn of the 19th Century, and that small but historically important parcel supports a growing and highly disadvantaged population of over 200 people. Compared to our original tribal lands, as indicated in Figures 2 and 9, it is a derisory small portion. The principle of compensation has also been accorded short shift.

#### 2.3 *Mabo* Revisited 2000

With the raised hopes offered by *Mabo*, the Yorta Yorta were one of the first Indigenous groups to take advantage of the Native Title process. Australia’s attempts to bring its law into line with the recognition of Indigenous title in other common law jurisdictions, and the High Court’s rejection of those actions that justified the theft of Indigenous land, were commendable achievements. The 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 was encouraging, the construction of new ones has been disheartening. As demonstrated in the YYNTC, this has set the Indigenous struggle for land in the more populous regions back to the pre-*Mabo* era. This experience suggests that the ideals of equality and justice before the law under present conditions remain ever elusive.

In establishing the ground rules for claimants to gain land justice, and the full respect that Native Title is seeking at common law, the High Court constructed major barriers to achieving land justice. It secured the property interests of settler society by applying the doctrine of extinguishment and refused to uphold fair and just principles in relation
to the confiscation of Indigenous land and resources. Justice Brennan's metaphor concerning the 'tide of history' was presented as an extreme case scenario of Native Title loss. Its application to the Yorta Yorta in its absolute sense, however, unless overturned, will have serious negative implications for other claimants. 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.

2.4 Structural Barriers Perpetuate Domination

Following Justice Olney's judgement, the fiction of terra nullius, rejected by Mabo as having 'no place' as a barrier to Indigenous land justice in 'contemporary law' (Mabo (No. 2) Brennan J. at 29, 40–3), has now been replaced by the 'tide' euphemism. In the YYNTC, it was used to try and wash away the underlying injustices that are at the heart of our struggle (Birch, 1997:9). The Olney decision is a graphic illustration of how this euphemism has been construed to justify land theft, to maintain the status quo, and to support the continued domination of Indigenous people. Indeed, Australian historian Patrick Wolfe's comment 'that to fall within Native Title criteria, it is necessary to fall outside history' eloquently summarises the Olney approach (quoted in Alford, 1999:42; see also Gray, 1999:15–26).

In using Anglocentric sources as a basis for reconstructing Yorta Yorta connections, Justice Olney displayed ignorance of accepted standards of analysis. The need to look at the body of knowledge within the context in which it was written and against the prevailing cultural biases of the time is universal practice. Early white ethnographers were notorious for interpreting traditional culture through their own blinkers, and were shown by other writers to exhibit bias. They mostly got it wrong. In reconstructing past and present Indigenous connections, ethnographic data is not exempt from the same standards of scrutiny as that which is applied to other sources. It is but one part of the larger jigsaw puzzle that is made up of 'many pieces' (Read, 1979:141). The privileging of European sources over the body of Indigenous knowledge is a racist approach to Native Title litigation. The Anglo-legal system already carries an historic bias and inequality towards Indigenous people by the exclusion of their oral testimony by the courts. Olney J.’s exclusion of Yorta Yorta knowledge can be seen as a reversion to past practices (Christie, 1979:115–16).
2.5 Race Relations Outcomes

After lodging our claim, we chose in good faith to go before the National Native Title Tribunal (NNTT), which again brought us face to face with opponents of Indigenous rights. While the process provided a forum for the Yorta Yorta to speak without being subjected to the hostilities of past claims, and a platform to contest existing misconceptions of land ownership, it turned out to be a failure. After gaining no substantive agreements or expressions of 'co-existence', particularly in the spirit of 'reconciliation', 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-*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 gaining Native Title through mediation proved to be the limitations imposed on the NNTT’s powers, and 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 accepted and given equal protection. The regional mindset that met the 1984 claim came back to revisit the Yorta Yorta, fuelled with increased intensity by the racial politics of One Nation, which emerged from the aftermath of *Mabo* and *Wik*. This mindset remains a key impediment to land justice in the *Mabo* era, and it is against this background that the possibility of negotiating co-existive agreements in the claim area needs to be recognised. This time it was 'backyards', 'main streets', and 'bucketloads of extinguishment' that our opponents peddled as myths of the day (Victorian Government, *Hansard*, 12 November 1998:10–25; Alford, 1999:43–4). In the absence of an equivalent-counter campaign, these myths were allowed to manifest themselves in antipathy towards local Indigenous groups. Indigenous communities were forced into a position of having to defend their rights against the attacks of the fearful and misinformed, rather than dealing with the issue at hand. The question of whether non-Aboriginal people are willing to abide by their own law's respect for Aboriginal title is pertinent to the YYNTC (see Chapter 5; Manne, 2000).
2.6 Who is Native Title Empowering?

The issue of empowerment under the Native Title process was analysed (Chapter 6). It was argued that resources being committed to Native Title have created a 'Native Title Industry' and that the Native Titleholders to whom the industry owes its existence benefit the least. This was clearly demonstrated in the Native Title process. The Yorta Yorta sat patiently at the back of the court, waiting for justice to be delivered, while their independent voices were spirited away by outsiders. The expenditure of those opposing the Yorta Yorta claim has not been made publicly available. The Victorian (Kennett) Government alone is said to have spent four million dollars, not to mention that expended by New South Wales and other land and water authorities (Age, 8 March 2000; Riverine Herald, 28 April 2000). The ability of State governments to absorb such high levels of expenditure in opposing claims without public protest inevitably leads to a massive increase in the cost and complexity of the process for all parties. It also substantially enriches many of those who have opted to ride on the Native Title bandwagon.

Given the enrichment of non-Indigenous parties, particularly the large cohort of lawyers, it seems likely that they stand to gain more from prolonging the proceedings than from resolving them. Indigenous people have been further disempowered by these litigious and protracted proceedings. Non-Indigenous professionals have become richer, while Indigenous claimants have had to wait impoverished on the periphery of the Native Title process. Against this background, it was argued that if the main source of empowerment, that is the Native Titleholders, were taken out of the equation the industry would not survive (Atkinson, 1999).

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 interests. The mercenary character of some lawyers, anthropologists and historians further exacerbated the battle. The knowledge and experiences appropriated from Indigenous studies and from other claims was sold to government and vested interests in attempting to undermine the YYNTC.

Ethical bodies associated with such professions must give serious consideration to the implications of these practices. The notion that expertise should simply be made available on a 'first cab off the rank' basis, in the manner of commercial legal practice has been put forward by some practitioners (see, for example, Maddock, 1998; Sutton, 1982), but this ignores the very nature of the knowledge on which disciplines such as anthropology and, to some extent, history depend. 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, or 'spy'. 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.

2.7 Summary

The principles relied on for analysing the Yorta Yorta struggle within contemporary notions of justice and human rights can now be assessed. From an Indigenous analysis, it was argued that the Yorta Yorta have been in occupation of the claimed lands since time immemorial, and that the Anglo-Australian legal system treats Indigenous title as an inferior interest that can be extinguished without the application of fair and just principles. The differential treatment of Native title under Mabo requirements was exposed as an inequitable burden that the Native Title process imposes on claimants (Chapter 5). The meagre rights offered, the recognition space between the two systems of law, and the unreasonable expectations imposed on claimants were critiqued by Indigenous and non-Indigenous analysts (Chapters 5, 9–10). Rather than the burden falling on the Yorta Yorta to prove rights, a more equitable process would be one in which, the onus should reside with non-Indigenous titleholders to prove the nature of their tenure and the means by which Indigenous land and resources were acquired. Under these conditions it would seem that shifting the onus of proof and applying substantive equality principles, are important measures that went missing in the YYNTC. It was these overarching principles that were relied upon by the Yorta Yorta in the spirit of Mabo to challenge opposing interests and achieve just ends for Indigenous peoples.

Land justice and the equality of rights that Indigenous people are seeking from the Australian legal system was the basis for analysing the YYNTC. It was shown that while procedural equality allowed us to vent the issues of land justice before the law, distributive justice as a means of correcting past injustices and of pursuing substantive equality was not delivered. The return of land is an essential stepping-stone to substantive equality. Without land as a spiritual, cultural and economic base, the notion of substantive equality is still to be realised. As demonstrated in Chapter 1, ‘special measures’ are fundamental human rights norms by which ‘substantive equality’ can be pursued. They are not deemed racially discriminatory but are designed to provide a disadvantaged group with a ‘starting point for participating as equals’. Once their objectives are achieved they do not amount to separate rights (Chapter 1). In view of our current land status, it is asserted that native title hearings should be guided more by principles of substantive equality.

The weight of the burden of proof imposed on the Yorta Yorta, and the differential protection given to settler rights, creates inequality. Notwithstanding the principle of
formal equality, it is inequality that has been perpetuated in the YYNTC. The way the Native Title law was applied created the conditions of contestation and closure. While we were able to assert traditional rights before the law, distributive justice was closed off by the sequential barriers process. No sooner were old barriers to land justice being dismantled than new ones were constructed. The YYNTC is a graphic illustration of the way the process of contestation and closure was acted out in the delivery of distributive justice. That is, the application of the 'tide of history' and the construction of a previous land claim were used to close off access to our due entitlements. Justice appeared to be seen to be done, insofar as providing a process for contesting the grounds of Native Title, but when it came to the final crunch, it was not delivered.

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 identified in Chapter 5 following Gove. 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 (Chapter 1).

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 white domination and racism still runs, particularly within government and parts of regional Australia. As indicated at the outset, 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. In the context of the quest for Reconciliation, the Yorta Yorta experience signified the intransigent refusal to recognise past wrongs and prior rights, and the need to repair past injustices. These are severe and enduring wounds that are integral to the Reconciliation process.

Similar issues were raised by the United Nations Committees on the Elimination of Racial Discrimination, March 1999, and Economic Social and Cultural Rights, August 2000. The Committees judged the Australian Government harshly for passing Native Title Act amendments that discriminate against Aboriginal people. The amendments undermine human rights principles. They also contradict the need to avoid past mistakes that were held to be discriminatory and unjust (Mabo (No. 2) Brennan J. at 29, 40–3; <www.atsic.gov.au>; Age 30 April 1999 and 3 September, 2000). While the Australian Government continues to ignore the findings, the reality is that the matter will stay on the United Nation's agenda. The plight of Aboriginal and Torres Strait Islander people has gained significant national and international attention. The spotlight being focused on the morally repugnant 'mandatory sentencing laws, racially discriminatory land rights regimes and the Stolen Generations Inquiry' are important matters for Australia's human rights credibility in the international arena (ATSIC, 1999).

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.

From the evidence, I have argued that notions of racial superiority and the practice of institutional racism underpin Indigenous disadvantage and are used to marginalise Indigenous rights. These have served to entrench Indigenous inequality. Unless the
barriers to land justice in the YYNTC are removed, the rhetoric of *Mabo* and the principles of law on which the Yorta Yorta pinned their hopes will remain elusive. With ‘not one iota’ of land arising from inherent rights, the words of Yorta Yorta elder William Cooper revisit us. One can be reassured that these words will continue to be the driving force of the Yorta Yorta struggle.

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