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Reflections on the Yorta Yorta Native Title Claim, 1994–2003

by Wayne Atkinson

Background

Given the history of our struggle for land justice, the High Court decision on the Yorta Yorta appeal highlights the elusive nature of Indigenous land justice in Australia. It also strengthens the sense of betrayal that has been created in the post Mabo era. Indeed it supports the view that ‘Not One Iota’ of land has been returned on the basis of our inherent rights. There are positive outcomes however in that the decision was not unanimous. It did recognise that ‘tradition’ is not a frozen concept but one that adapts to changing circumstances and continues, but the majority of judges were not prepared to overturn the restrictive and Anglo centric approach used by Justice Olney in the Yorta Yorta case.

The dissenting judgements of Kirby, Gaudron JJ. and Black CJ of the Federal Court are illuminating. They found that Justice Olney’s test for determining native title in the Yorta Yorta v State of Victoria and Ors (1996–1998) was too restrictive, that various aspects of the evidence should have been the subject of findings by the trial judge, and that the case warranted a retrial. They also highlighted the difficulties and dangers in making findings about the expiration of native title at a particular point of time. The High Court decision indicates that the question of land justice in the Yorta Yorta context is far from being resolved. Whether land justice can be achieved through negotiated settlements is now the key issue.

It is against this background, that my reflections on the Yorta Yorta Native Title Claim are presented. I speak as one of the principle claimants in the Yorta Yorta v State of Victoria and Ors, as a member of the Yorta Yorta Council of Elders, and as a representative of my ancestral lineage of some 1200 members.

I will discuss the native title process thus far and examine what I perceive to be the main barriers to land justice under existing politico-legal processes. Speaking from the position of a participant in the native title process, I will examine the way that the ‘Native Title industry’ has usurped Indigenous voices and has empowered itself on the backs of Indigenous claimants. It is argued that the power dynamics of domination, racial inequality and status quo politics are the key barriers to land justice in 21st Century Australia and that these have been perpetuated in our case.

Native Title Outcomes 1992–99

Over a decade has passed since the High Court recognised the existence of Native Title at common law in Australia (Mabo 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 (NNTT 1999; The Age 1996).

The decisions of the Courts (1998 and 2002), coming at the end of years of scrutiny of the Yorta Yorta people, and the subjugation of our voices to those of outsiders, have been disappointing outcomes. Much of the disappointment remains, but being familiar with similar setbacks, and belonging to such a resilient group of fighters, the struggle will continue.

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.

Current Yorta Yorta Land Status

State and Commonwealth governments have refused to recognise prior Indigenous rights and to apply fair and just principles 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 (1,800 acres). It was this land that Justice Olney construed to imply that on acceptance of this small grant of land for their survival, the Yorta Yorta relinquished their inherent 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. Compared to our original tribal lands, of some 20,000 square kilometres, (see map) it is a derisory small portion. The principle of compensation has also been accorded short shift.

Map of Traditional Yorta Yorta Territory

Native Title Land Being Claimed
In Traditional Yorta Yorta Territory

- Original Native Title Land and Waters = 20,000 sq kms
- Claimable Land Under Native Title Law = 2,000 sq kms
- Freehold-Private Land in Claim Area

New South Wales

Victoria

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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 Yorta Yorta Native Title Claim (YYNTC), this has set the Indigenous struggle for land in the more populous regions back to the pre-*Mabo* era of Justice Blackburn in the *Gove* case, 1972. 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 for the confiscation of Indigenous property. 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.

**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* 1992: 29, 40–43), 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 Yorta Yorta case (quoted in Alford 1999: 42; see also Gray 1999: 15–26).

In using Anglo centric 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. In reconstructing past and present Indigenous connections, ethnographic
'Native Title Industry' and 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 although the figure of 20 million dollars is now being suggested (Rintoul 2002: 1). 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 (Gordon 2000: 3; Riverine Herald 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 and experts, it seemed likely that they stood 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, on whose rights the industry is dependant, have had to sit it out impoverished on the periphery of the Native Title process.

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 aided and abetted the attacks on the integrity of our claim from opposing interests.

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 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.

**Conclusion**

In the final analysis, it seems that it is not so much a question of the law providing justice for Indigenous people but one of how justice can be achieved against existing barriers. As witnessed in the Yorta Yorta case, the privileging of Anglo-knowledge and property rights and the derogation of Indigenous entitlements are inherent obstacles. Others relate to the shameful record of State governments in dealing with land justice, the antipathy of opposing parties and the mindset of regional Australia. These barriers are not dissimilar to those experienced in past claims. That is, when the foundations of the law in relation to the ownership and control of land are contested, and ground appears to be gained in the struggle for justice, the system tends to close ranks.
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 jigsaw puzzle, of many pieces (Read 1979: 141). The privileging of European sources over the body of Indigenous knowledge is an Anglo-centric 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: 115–116).

**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 1998: 10–25; Alford 1999: 42–44). 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.

**Who Is Native Title Empowering?**

The issue of empowerment under the Native Title process needs to be exposed. Resources being committed to Native Title have created a
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 dynamics between the dominator and the controlled, and notions of racial superiority that continue.

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. 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. It is within this context that 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 1992: 29, 40–43; ATSIC 2000a; ATSIC 2000b; The Age 1999; The Age 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. There are major flaws in the criteria being used to translate Indigenous law and knowledge into the Anglo-Australian legal system because of pre-existing norms and values. The NTA cannot be
interpreted without reference to the existing context and interpretive tradition. The Yorta Yorta case exemplifies these inadequacies and highlights the prevailing barriers.

Unless the barriers to land justice in the YYNTC are removed, the rhetoric of *Mabo* and the principles of law on which we pinned our hopes will remain elusive. With 'Not One Iota' of land justice forthcoming, in 21st Century Australia, the words of Yorta Yorta leader, William Cooper are vindicated:

> How much compensation have we had? How much of our land has been paid for? Not one iota! Again, we state that we are the original owners of the country. We have been ejected and despoiled of our god-given right and our inheritance has been forcibly taken from us (William Cooper, Yorta Yorta 1939, quoted in Hemming 1994: 17).

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

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