The Victorian and New South Wales Governments decision to create Barmah-Millewa National Parks under Joint Management arrangements with the Traditional Owners has delivered some land management rights to the Yorta Yorta Nation. Indeed they will now be able to work with Government agencies on both sides of the Murray to manage and to care for the future of these magnificent natural forest wetlands.

The possible effects of this decision on Yorta Yorta inherent rights to land that their ancestors occupied since time immemorial, by comparison with what may have been delivered through the native title process, and what now could be achieved through the recent ‘Traditional Owner, Land Settlement legislation, 2010’ is the substance of this paper.

In examining the traditional rights of the Yorta Yorta to land justice and to social, economic and cultural empowerment, through National Parks and Joint Management agreements, NPJMAs there are some key issues that need to be put up front at the outset. These are:

- the Yorta Yorta struggle for fundamental rights and the nature of their connections with the ancestral land and waters.
- The difference between National Parks & Joint Management and what rights they deliver to the Yorta Yorta in the post Yorta Yorta Native Title Claim process (1994-2002).
- The Victorian Traditional Owner Land Settlement Legislation, 2010 (passed Parliament, 14, September, 2010), as an alternative path to land justice for Victorias Traditional Owners as opposed to the flawed Native Title process.

These issues will be used to provide an Indigenous perspective on the Yorta Yorta struggle for fundamental rights that culminated in the declaration of the cross border National Parks and Joint Management outcomes in 21st Century Australian political discourse.
Background

The legacy of colonisation and the denial of Indigenous rights began with the arrival of settler society, and their attempts to eradicate and to forcibly remove the traditional owners from the land to justify the notion that Australia was terra nullius. From then on it can be argued, that the Yorta Yorta have had to fight tooth and nail for those rights afforded to all peoples under fundamental Human Rights Declarations and Conventions. From the outset the most basic rights, that ‘all humans are born free and equal in dignity and rights before the law, and that no ‘one shall be arbitrarily deprived of his property’ was blatantly disregarded (The Universal Declaration of Human Rights, 1948) It was not until 1967 that some of those rights were restored when those racist sections of the Australian Constitution (section 51 and 127) were changed, to make Indigenous Australians ‘people’ of the Commonwealth, to whom the law applied and protected (Australian Constitution). Therefore the Yorta Yorta people in the words of, elder Aunty Liz Hoffman, have been continually fighting for their rights from the ‘old position of nowhere’ in terms of the power dynamics of achieving rights under the imported Anglo-legal and political system (Atkinson, 2000).

A return of the crown lands that the Yorta Yorta people have managed and cared for since time immemorial is not a new concept but one that continues to be immortalised in the saying that the ‘Struggle Continues’ in Yorta Yorta history. For Yorta Yorta people the land and the world view in which they live is an extension of themselves. The land and water is the embodiment of their identity and existence, as river based people, passed on by the great creation spirit Biami. Yorta Yorta elder Colin Walker describes his people’s relationship with the land in the following way:

*I think the forest is like a human body. The Murray River is the spine, and the Barmah and Moira Lakes are the kidneys on both sides. That is how*
the old people used to look at it. They would say – ‘this is our life’. It is a living thing. We are the land, and we are mother earth. We fit in like that.¹

This quote eloquently describes just how deep the connection is, and illustrates the relationship that exists between Yorta Yorta people and their land in a reciprocal way. This is further exemplified by the antiquity of Yorta Yorta occupation of the ancestral lands which according to scientific evidence is placed around 60,000-12000, a huge time span when etched into the context of the formation of the Australian Commonwealth, in 1901 (Atkinson, 2000).

Yorta Yorta knowledge of the land is timeless and the experience of the profound changes that have been witnessed since white settlement needs to be factored into the equation. Against this background it can be understood that the absolute devastation of this unique environment, and its impact on Yorta Yorta culture and heritage, has been a painful process. This gives more reason for the Yorta Yorta people to have their forest-wetlands back in their entirety under sole management, so that it can be nurtured back to a state of health for the enjoyment of future generations. This of course would mean holding the reigns for all decisions and future policy directions.

Land Justice

Considering these issue it is imperative that land justice for the Yorta Yorta people would mean them having an equal, as opposed to a marginalised, voice in all decisions made over their land and waterways. They should be at the table for all decisions made by the Government involving the future of this ecosystem, with an equal voting right to ensure that they can determine policy direction. This would give them an opportunity to provide their intimate knowledge of the land to produce the most beneficial outcome. Furthermore, it would promote the unique cultural value of the waterways, which should be considered on an equal footing to agricultural, industrial and household use, as it will also produce beneficial environmental outcomes. Acceptance of Yorta Yorta traditional ownership by the Government would be a giant leap toward improving

relations, as well as providing a source of income for the Yorta Yorta people through the Government leasing the land off them for use as a National Park. This income could be used to generate an economic base for the Yorta Yorta to establish cultural and education programs within the park and a chance for education exchanges between Indigenous and non-Indigenous peoples. With an understanding of what this would entail, an examination of the rights afforded under Native Title, and those potentially on offer under Joint Management, and the newly created Traditional Owner Land Settlement Legislation, 2010 will now be examined, to determine how successful Joint Management will be in providing Yorta Yorta people with greater empowerment and land justice.

Native Title: What could it have delivered?

In the best circumstances Native Title affords a limited set of rights that can vary significantly, depending on a multitude of circumstantial issues, and is in no way a set body of rights. Nonetheless, in *Mabo v Queensland (No 2)*, (Mabo), the watershed case that first granted a group of Indigenous Australians Native title, Brennan J, one of the High Court Judges, stated that ‘this court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.’ This phrase illustrates that Indigenous Australians will always be restricted to working within the Anglo centric and legal paradigm. The Crown will always hold radical title, underlying all other rights. Therefore Native Title will always be one of the most fragile property rights, because it cannot be protected against third parties and it cannot be alienated to anyone except the Crown. It can also be extinguished in a variety of circumstances, for example where there are certain leases, public works or freehold estates. While it can potentially provide access to traditional lands for Indigenous peoples, whether in the form of absolute ownership or visiting and

---

permissive occupancy rights, and while it can encourage lease holders to discuss actions taken on land, for example in the case of mining leases, in the majority of situations it is a limited and fragile right. It tends to look more impressive on paper than it does in reality, and it does not provide the ability to have an influential vote or opinion.

National Parks, Native Title & the Yorta Yorta Case

One also needs to reflect on what might have been the outcome of the Yorta Yorta case if the course of justice had not be perverted, and Justice Olney had of found that Native Title existed? The next and most obvious question that the Judge would have had to address, in accordance with the native title requirements, is the extent to which it existed in the crown lands being claimed. Given the failure of the mediation process to reach a consensual agreement, through mediation and the demands that were placed on the Native Title process by graziers, loggers and other vested interests to have their interests protected, the most likely outcome for the Yorta Yorta would have been a patchwork of use rights similar to those of other native title claims in Victoria-see Wotjaboluk Native Title Claim in the Mallee Wimmera region, 2007.

The opponents of the claim lobbied heavily for their rights to be recognised, a matter that was evident during the claim, and one in which the Judge had to deal with in terms how their rights were to be treated in the new legal framework. Given the narrow and restrictive way that the Judge applied the law in the Yorta Yorta case the possibility of gaining exclusive possessory rights or full title to the land that their ancestors occupied since time immemorial, was an illusion rather than a reality. The perversion of the course of justice in the Yorta Yorta case and the insurmountable barriers that were constructed to prevent them from achieving land justice is the main reason that the Yorta Yorta retreated to the political process to achieve fair and just outcomes.

The other key issues that can now be revisited is that if native title was found to exist and a coexistive arrangement was the outcome; what influence would that have had on the Victorian Environment Association Council, VEAC and the NSW, Natural Resource Councils, NRC study of the Murray Red Gum Forest Wetlands? Both recommended National Parks and Joint Management arrangements with the Yorta Yorta as the
Traditional Owners? In a most fortuitous turnaround, the recommendations on the removal of those interests (cattle, loggers and other hard use activities) that posed an insurmountable impediment to the native title claim cleared the way for the Yorta Yorta to fight back, and to have a more open go at advancing their interests through the pathway of National Park and Joint Management.

These are important questions of review, particularly in light of what has been achieved through the campaign for land justice via the political process. The retreat to the political process along the lines of former Yorta Yorta leaders, culminated in the achievement of National Parks and Joint Management, and the possibility of a handback leaseback arrangement that can deliver inalienable title (Cooper, 1939). In the final analysis it seems that the path to land justice through the political process has been more productive and has arguably delivered much more than the failed native process. Indeed a full circle has been turned through a people’s movement campaign in solidarity with the Yorta Yorta.

By comparison, the National Park and Joint Management Agreements for the Barmah-Millewa Forest Wetlands has much more potential for environmental and cultural protection, as well as economic and educational advantages. While negotiations are still underway as to the nature and form of this management regime, it has been suggested that it will follow similar models that were set up for Mutawintji, NSW, Boodaree, ACT and Kakadu, NT, National Parks. However, while these examples utilise Joint Management, which means that the land is handed back to traditional owners under the condition that it is then leased back to the Government, Victoria will begin as a Co-Management scheme, with intentions to move toward Joint Management in the following five years.

These two models are essentially the same, except for the hand back mad ownership of land. This means that Yorta Yotra people will not have benefit financially from leasing the land back to the Government, or the official acknowledgement that they are

---

traditional owners. What this model would provide is a majority for Yorta Yorta people on the National Park Board of Management (BOM), and: ‘...rights to occupy and use the land, and to make decisions on the resources provided by the State for the management plan and for the management of the land and resources’.\(^8\) This means that traditional knowledge on environmental preservation, regeneration, and sustainability can be utilised. Moreover, it presents the potential for ‘cultural flows’ to be required allocation of water use, with the Yorta Yorta BOM majority. ‘Cultural flows’ signify allocations of water for the purpose of cultural practices and traditions, and are associated with Yorta Yorta rights in relation to water resource management.\(^9\) The connection between Yorta Yorta cultural practices and the environmental health of this region are so closely interwoven that a benefit for one necessarily produces a benefit for the other. Whether this new arrangement allows for the re-establishment of the magnificent Dharnya Centre as a live in learning and educational centre for the Yorta Yorta to manage and control also needs to be mentioned.

In conclusion, the newly proposed Joint Management plan for the Barmah National Park has the potential for real benefits for Yorta Yorta people in the context of those fundamental rights previously discussed. These are primarily in relation to providing a voice for Yorta Yorta people to utilise their knowledge, make decisions regarding their land, and influence water allocation and policy. Furthermore, the educational opportunities and room for financial gain through Dharnya and the concept of cultural tourism are also positive aspects of this plan under the proposal of Joint Management. The one key area where improvement could be made is through an actual hand-back of land to traditional owners. As a result of the pain and suffering Yorta Yorta people have been, and still are, subject to because of racist laws and beliefs, it is not until this central wrong has been turned right that Victoria and New South Wales will truly be on a constructive path forward. Yet it seems that this hand-back may be in the plan for the next five years, and it will be a matter of holding the Government accountable to this to ensure it’s followed through. There will, then, be a good chance for the Murray River,

---

and the surrounding Goulburn and Ovens Rivers, and the forest-wetlands to flourish once again, and for the River Red Gums to stand tall as they have for centuries.

Victorian Traditional Owner Settlement Legislation, September, 2010

In closing it is important to note that the Victorian Government has just passed its Traditional Owner Settlement Bill, 2010 which will provide an alternative land claims process to the long, drawn out and costly Native Title process.

The ‘Traditional Owner Settlement Bill’ arose out of the Native Title Settlement Framework Agreement, and a package of land justice and empowerment measurers for Victoria’s Traditional Owners. They were presented by the Land Justice Group as an alternative to the native title process as a means for dealing with the current rate of native title claims, which according to government advise, could take up to ‘55 years to finalise’ (Consultations on Native Title Framework Agreement, Barmah, 10 October, 2009).

Finally, the Attorney General, Rob Hulls could be on track for Traditional Owners, when he said that “Business will only be finished …when the legacies of dispossession and assimilation, of racism and disadvantage, are dismantled on every front’ further emphasising that the ‘possibilities of genuine land justice are one such front”. Fine sentiments that hopefully will be delivered to Traditional Owners, in Victoria and the Yorta Yorta on the northern front?
BIBLIOGRAPHY


Mabo v Queensland (No 2), (1992) 175 CLR 1


Murray-Darling Basin Initiative, *About MBD Initiative*,
<http://www2.mdbc.gov.au/about/murraydarling_basin_initiative__overview.html>


Ramsar Wetlands Report, Feb 2\textsuperscript{nd} 2009

Save Victoria’s Red Gum, ‘Historic Decision Protects Victorian Red Gum’,
<http://www.saveredgum.org/node/64> (accessed 20 March 2010), 30 December, 2009

Universal Declaration of Human Rights, 1948


