Yorta Yorta Survival


1 Introduction

This chapter deals with the post-colonial context and Yorta Yorta survival. It examines the lands set aside for Yorta Yorta use and argues that they constituted an important patchwork of linkages through which Yorta Yorta occupation continued. The history of land conflict and survival is crucial for understanding the nature of the Yorta Yorta struggle and for analysing the reasoning behind the application of the law in the YYNTC. The past, the present and the future in Indigenous and non-Indigenous epistemology are inseparable (Perkins, 2000:3; Watson, 1999:3; Yunupingu, 1998:1–13; Dodson, M., 1994:10). The philosophy of history teaches us that the present reveals itself through the past. One is also reminded of the relationship between history and law in the post-colonial period when Justice Brennan said: 'no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice (especially equality before the law) which are aspirations of the contemporary Australian legal system'. These are the underpinning principles that will be used to demonstrate that the Yorta Yorta have withstood many tides of change and have survived as a people, with their cultural and physical connections still firmly embedded in the ancestral land and waters. In the final analysis this will be the basis for arguing, that the application of the 'tide of history' metaphor from Mabo, in the YYNTC, has constructed another barrier to land justice (see Mabo (No. 2) Brennan J. at 43, 59-60; Pitty, 1999:2; Alford, 1999:39–42).

2 European Invasion

Colonisation of the claim area was driven by notions of racial superiority, and Anglocentric views of land ownership. This mindset played a critical role in shaping colonial policy and in underwriting the theft of Indigenous property. Prevailing ideologies of land ownership in accordance with Anglo celtic critiques of land use were used to justify dispossession. Because Indigenous people used different ways of gaining returns from the land to that of English modes of production, they were treated as not owning the land. Indigenous possessory rights, validated by divine order and sustained by 60,000 years of occupation, were put on hold for the next two centuries, by the application of terra nullius (Broome, 1995; Christie, 1979; McRae, Nettheim and Beacroft, 1997:34, 75; Bartlett, 1993:12–14; Reynolds, 1987:31–3; Jacobs, 1972:140–1).
The deception of *terra nullius* was a powerful incentive at colonisation, but the assumption of a vast unoccupied hinterland was inevitably confronted when settlers came face to face with the reality of Indigenous occupation (Ah Kit, 1997:55–6; Ridgeway, 1997:65–7; Bartlett, 1993:14; Reynolds, 1987:31–3; Goodall, 1996:106; Bourke and Cox, 1994:52; Hookey, 1984:1; Pearson, 1993a; Neale, 1985:17–18).

In theory, *terra nullius* may have held sway at colonisation; in practice, however, it attracted substantial criticism in England and in the colony of New South Wales (Select Committee Inquiry, 1837). The question of Indigenous occupation and land rights was raised in the establishment of the Port Phillip Protectorate and in the instructions of the Imperial government to the colonising commission of South Australia (Reynolds, 1987:99, 100, 105, 115; 1972:45–53; Bartlett, 1993:10–14; Bourke and Cox, 1994; Markus, 1994:36–49; 1987:48–53; Dredge, 1845:44).

The falsity of *terra nullius* was partially recognised by the Imperial Government in the 1830s and 1840s, but the whites in the colony of New South Wales were less honest. An influential example of the ideology that drove settler interests in the taking of Indigenous land is reflected in the 17th Century writings of John Locke. Locke's view of land belonging to a common pool that could be individually owned by those who worked the land and made it productive had strong influence on British Imperial land policy. It provided a precursor to the coloniser's arguments concerning Indigenous occupation and land use. Many of the arguments used to attack Indigenous land rights today by opponents of Native Title, can be sheeted home to this mindset. The crucial point, however, is the contrast between these ideas and Indigenous views of land ownership (Locke, 1983:177–80; Reynolds, 1992:74).

Parallels have been drawn between Indigenous and introduced land philosophies (see Chapter 2). The mixing of labour with the soil for productive returns in Indigenous epistemology was customary practice, but the accumulation of land as individual property to be mastered and traded was alien (Sharp, 1996:16). Within any given Indigenous community, such practices did not involve appropriating the land from the common pool for oneself. Land in Indigenous thought was inalienable and stayed in the community pool. Major differences exist however, between Indigenous society and the sort of society envisaged by Locke. Far from a simple 'common pool', Indigenous Australians possessed a highly elaborated system of land interests (Locke, 1983:177–80). Certainly, within a particular community you could reasonably say that a common pool existed, but even then different people had different rights and interests. The assumption that Indigenous interests simply amounted to a general communal involvement was one of the fallacies used to
justify the taking of Indigenous land. The idea of being able to accumulate more land and
the concept of alienating something that was created by the spirit ancestors was
incomprehensible (Wensing and Sheehan, 1997:4–5).

Indigenous law certainly accommodated Locke's notion of a communal pool of rights but
ownership was much broader and more complex than the simple act of accumulating
property based on labour. Within Indigenous society, interests in land were understood in
complex religious as well as economic and political terms. Rights to land are shared
between owners and visitors, other interests could be accommodated during periods of
scarcity and there were long established trade relations, which allowed access to land for
the exchange of resources (see discussion in Chapter 2). Locke, like many other western
writers, had a hierarchical view of societies, with an earlier simple 'natural' process giving
way to the complexities of regulation involved in the European nation states (Jacobs, 1972).
Indigenous interests in land were different to those of Europe, but they were no simpler.
Rather they had developed along different paths.

Since colonisation, such ideas have remained a barrier to Indigenous land justice in
Australia. It is the common law, however, that the Yorta Yorta called on following Mabo
to find a way through the impasse. I will now analyse the effects of the colonial mindset on
Yorta Yorta society and then examine the means by which occupation has to be
legitimated (Weberriss and Frauenfelder, 1996:3–4, 11; Mabo (No. 1–2) 1988, 1992;

3 Effects of Colonisation

The current Yorta Yorta population is estimated to be 5,000–6,000. Pre-colonial figures for
the eastern half of the claim area suggest a population of approximately 2,500–3,000
(Hagen, 1996; Harris, 1995–98). The white invasion is reflected in the population estimates
for the period between 1839 and 1863. The original population was reduced by 85% in the
first generation of white contact and it did not stop there. The Victorian Aborigines
Protection Board estimated that in the Victorian section of the claim area (1863) there were
only 365 Yorta Yorta survivors. In Victoria there were only 1,920 Kooris remaining out of
an estimated pre-contact population of 15,000–20,000. Introduced diseases, settlers' guns,
poison, and frontier violence over land were the main causes of the population decline
(Age, 12 July 1998, 'Koori Week Feature Articles': 13; Broome, 1995:31–2; Christie,
1979:78–9; Grimshaw, 1994:134–8; Reynolds, 1981:99; Barwick, 1972:15; Dingle,
Historians have re-examined the extent of frontier violence and depopulation. Christie argues that between 15% and 25%, or 2,000 Aborigines, died by the rifle in Victoria alone and the figure of 20,000 has been suggested for Australia (Reynolds, 1981:99). Reynolds argues that Indigenous depopulation by the rifle in northern Australia was higher than the lives lost in all the overseas wars including Vietnam. The memory of tragic events like these underpin our history of land struggle and remain indelibly embedded in the consciousness of Yorta Yorta people (Cannon, 1993:12–14, 104, 165; Reynolds, 1987:1; Christie, 1979:68–8; Cole, 1984:25).

The extent of violence over land is a tragic reflection of race relations in the claim area. The recovery rate of 5,000–6,000 is even more amazing when considered against the extent of depopulation. Indeed, it is an admirable example of human survival and a reflection on the brutality of colonisation, not to mention the underlying values of injustice and inequality before the law. Reparation for damage to culture and for acts of genocide are integral to our struggle for land justice. These are addressed in chapters 13–14 of Bringing Them Home,
Report of the HEREOC, 1997. Some individual cases for compensation are currently being heard by the Federal Court (McRae, Nettheim and Beacroft, 1997:132, 145–46; Dodson, M., 1994:10; Mabo (No. 2) 1992, Brennan J. at 62; Chronology of Claims 1861–1998, Appendix. 1). The Yorta Yorta Compensation Claim will not be heard until after the YYNTC, but the underlying causes of land justice cannot be isolated from the current YYNTC (Yorta Yorta Compensation Claim, Federal Court 1995).

4 Yorta Yorta Resistance

The myth that Kooris passively acquiesced to the taking of their land or ceded their sovereign rights has been rejected (Cannon, 1993; Goodall, 1996; Cole, 1984; Christie, 1979; Broome, 1994; Howard, 1982; Reynolds, 1981). Violence over land was generally widespread and particularly severe in the southeastern region. Detailed accounts of Yorta Yorta resistance and the strategies used to defend their sovereign rights are well documented. They mounted attacks on homesteads, dispersed and killed stock, used fire to burn huts and push back intruders, and forced many pastoralists off their stations. Knowledge of bush terrain, wetlands and vegetation were utilised and traditional bark canoes were used to elude settlers and the police force. These tactics were clearly aimed at driving settlers out of the area and defending Indigenous territorial rights (Watson, 1996:1–12; McGrath, 1995:12–13; Kickingbird 1993:32; Bourke, 1994:52–3; Cannon, 1993:1–5; Dixon and McCorquodale, 1991:226–66; Reynolds, 1981).

Yorta Yorta resistance manifested itself in different ways. In April 1838, an estimated three hundred Yorta Yorta/Bangerang attacked George Faithfull's overlanding party, in the eastern part of the claim area (near Benalla). This was believed to be a payback for breaches of tribal protocols, namely the abuse of women, from a previous expedition. Resistance was strong in the heartland around the Moira area where large numbers attacked Moira Station (in 1843) with firebrands of spears, using bark canoes to retreat into the reed beds. The use of traditional knowledge and skills to defend country from white occupation were effective resistance strategies. Indeed the evidence suggests that at the height (1843–50) of resistance, the Yorta Yorta were gaining the upper hand (Hagen, 1996:19; Christie, 1979:63; Cannon, 1993:141–42; Christie, 1979:63).

Moira Station became a refuge for local squatters. Henry Lewes reported:

Mr John Clark's people driven out by natives from their station down the Murray; A part of Messr's Gwynne's herd came here from the Edward's River driven out by natives; All Mr. Green's men came here having been driven out of his station down the Murray; Messrs Gwynne's again driven from station; Mr. Will's people came here for aid' (Lewes, 1883:7–8).
Further attacks on Torrumbarry and Tongala stations caused local pastoralists to call on the para military forces (Christie, 1979:63; Curr, 1965:89–97). The troops stationed themselves at Moira in December 1843, and combined with local settlers to mount a punitive attack on the Yorta Yorta, which took place at a fishing camp near the Moira reed beds. The Yorta Yorta retreated into the reed beds for protection, where it is alleged that the troops pursued them and 'shot them like wild dogs', including children (Cannon, 1997:141–42; Select Committee Report on the Aborigines, 1845:41).

Earlier historians ignored the extent to which violence underwrote white settlement in the claim area (Morris, 1970:1). The achievements of the pastoral industry are praised while the Indigenous struggle to protect territorial rights is played down. Priestly, for example, in Echuca: A Centenary History (1965) claims that Aborigines 'never presented any effective barrier to white settlement of the district'. The evidence shows that these were convenient myths that were used to propagate the notion of peaceful settlement (Reece, 1974; Reynolds, 1987; Ryan, 1981; Christie, 1979; Loos, 1982; Millis, 1992). The Select Committee Inquiry of 1836–37 and the High Court in Mabo was willing to admit that violence over land was at the heart of Australia's history (Mabo (No. 2) 1992 Brennan J. at 69; Priestly, 1965:5; Select Committee on Aborigines in British Settlements, 1836–37).

Being denied land justice at colonisation is important for measuring the extent to which Indigenous rights and interests are recognised in light of Mabo. The rules may have changed but whether the law is capable of recognising past wrongs and applying justice and equality before the law in accordance with contemporary values are crucial factors (Age, 24 October 1998; McRae, Nettheim and Beacroft, 1997:36–7; Hagen, 1996; McGrath, 1995:27–8; Bourke, 1994:52–5; Chisholm and Nettheim, 1992:12–13; Neal, 1991:17–18; Aboriginal Law Reform Commission Report, 1986:19; Reynolds, 1981:72–8).

The physical struggle over land may have ended in the middle of the 19th Century but the battle for land and reparation for past wrongs was just beginning. Those measures that were introduced to provide some land for the Yorta Yorta and to protect them from further atrocities will now be examined (Broome, 1994: 77–86; Barwick, 1972:45–68; Goodall, 1996:46; Aborigines Advancement League, 1985:22).

5 Protection

The exposure of Britain's colonising practices was at the heart of the Protection Policy. Reports from Australia of the near extinction of the Tasmanian Aborigines, the massacres of Aborigines by whites in NSW, and atrocities elsewhere, prompted the British Select Committee Inquiry of 1836 (Christie, 1979:81–2; Rowley 1972b: 53–4). The report of

The Committee conceded that Europeans entered Indigenous lands 'uninvited' and recognised that Indigenous people had an 'incontrovertible and sacred right to their own soil' and agreed that the taking of Indigenous lands had 'deprived them of the means of existence' (Report From the Select Committee, 1836–37:5–6).

The report brought home the brutality of British invasion and the state of race relations in colonial Australia. Moreover, it highlighted the inseparable nature of those injustices that are still at the heart of the Indigenous struggle (Report From the Select Committee, 1836–37:5–6). The outcome of the inquiry was the establishment of the Port Phillip Protectorate that was set up under the policy of Protection (Victorian Protectorate System, 1838–49), which was aimed at providing some land and protection for Indigenous groups. The Goulburn Protectorate, established on the lower Goulburn River, has relevance to the Yorta Yorta (Chesterman and Galligan, 1997:15–16; Christie, 1979:43; Broome, 1994:69–86; Barwick, 1972:20; Select Committee Inquiry, 1836–37).

**Location of Protectorate Stations**

![Port Phillip Aboriginal Protectorate: 1838-1849](image)
The Goulburn station (see map) was used intermittently by those Yorta Yorta occupying the southern part of the claim area, but due to the lack of government support and the opposition to its existence from local squatters it was closed in 1849 (Barwick, 1972:20; Bossence 1965:47; Robinson, 'Papers', 1854; Select Committee of Inquiry into the Aboriginal Protectorate, 1849; Bossence 1965:43; Massola, 1968:4, 5). Residents of the station were left to their own means of support. They continued to camp at the traditional campsites on the edges of pastoral stations and to support themselves by hunting and fishing. Other reserve lands allocated within the claim area were important for the continuity of Yorta Yorta connections. However, the reserve system as a tool of colonisation and land restitution and as a basis for Indigenous survival had its antecedents in other British colonies. It is argued that the reserve lands and other areas of land within the claim area became crucial linkages between the Yorta Yorta and their Native Title rights (Clark, 1950:90–102; Dredge, 1845:44; Bossence, 1965:44–56).

6 The Reserve System

At least two centuries before Australia was colonised, reserves were used to relocate traditional Irish groups under the 'Ulster plantation scheme' in 1769. The idea of separating Indigenous people and placing them on reserves was subsequently developed in the United States. It became national policy to remove Indigenous Americans to reservations under the Indian Removal Act, of 1830 (Christie MacLeod, 1967:26–7; Personal communication with Professor Henry Dobins, Newberry Library, Chicago, 1981).

There are major differences in the recognition of American Indian land rights and Indigenous Australians, but the mindset behind the reserves system was consistent. While the primary aim was to relocate Indigenous people from the traditional lands, the reserves became enclaves of Indigenous political resistance and survival. Indeed those reserves that were established within the traditional lands, as will be demonstrated in the Yorta Yorta case, were skilfully manipulated to provide for the continuity of inherent rights (Christie MacLeod, 1967:26–7; Rowley, 1972a: 183–4; Chesterman and Galligan, 1997:16–30; Jacobs, 1972:140–1; Costo and Henry, 1977:219).

The patchwork of land within the claim area that enabled the Yorta Yorta to hold onto their connections will now be examined (see Figure 7).
7 Reserves in the Claim Area

After the Protectorate, many attempts were made to set aside land for the Yorta Yorta. The 1849 Committee of Inquiry recommended that reserves be established along the Murray so that groups could settle on the land, adapt to farming and continue their traditional hunting and fishing activities (Barwick, 1972:45–51).

The process of combining farming with traditional practices was supported by the Chief Protector George Robinson who recommended that 'Aborigines be allowed free access to Lakes, Rivers, Swamps, Lagoons, etc. and their favourite hunting grounds at the season for hunting' (Select Committee Report 1849:12–14; Goodall, 1996:Chapter 5 'Dual Occupation'). The recommendation was never adopted and other attempts to set up reserves on the Murray faced similar problems. Nonetheless, the Yorta Yorta continued to occupy and use the traditional lands and waters. They continued to gather at traditional strongholds within the claim area, to hunt and fish, and to support themselves by working for local pastoralists (Select Committee Inquiry 1859–60:22, 26, 83; Select Committee Report 1849:12–14).
8 Ration Depots on Pastoral Stations

The encroachment of pastoral stations onto traditional Yorta Yorta lands created a relationship of interdependence. The establishment of ration depots and the appointment of pastoralists as local guardians were important linkages for the Yorta Yorta. Ration depots were located on pastoral stations throughout the claim area, and those that were located in the towns were run by local magistrates (see Figure 7). Some land was also reserved for Yorta Yorta use at Whugunya (near Corowa) in the eastern part of the claim area. From 1861–91, these became important bases for the Yorta Yorta to seek aid and to maintain connections with country. As will be shown, they also became important for the development of the pastoral economy (Select Committee Inquiry, 1859–60; Felton, 1981:174; Barwick, 1972:298).

In the absence of government-run reserves, various attempts were made to remove some of the Yorta Yorta, particularly children, to the Coranderrk reserve near Healesville in 1863. Most refused to leave their country however, and used the river to evade the Victorian government's forced removal policies of 1869–86 (Barwick, 1972:14). Not that Coranderrk was unfamiliar territory. A long established connection of trade and social relations existed between the Yorta Yorta and Kulin groups (see Chapter 2). This continued through Coranderrk, 1863–1924, and the Maloga and Cummeragunja reserves of 1874–88 to the present (see Figure 8 for location of Maloga and Cummera and other reserves/mission stations in Victoria and New South Wales; Cato, 1976:8–9; Barwick, 1972:14; Victorian Aborigines Protection Board Annual Report; 1863:9; Christie, 1979:177; Chesterman and Galligan, 1997: 11–30; Barwick, 1969:76; 1972:45).
Before examining the Maloga and Cummeragunja lands I will analyse the legislative and administrative framework of the reserve system.

9 Administration of Reserves

Responsibility for granting land and running reserves in the claim area rested with the respective Victorian (1860) and New South Wales (1883) administrations (Chesterman and Galligan, 1997:131; Broome, 1994:161–2). Although Yorta Yorta territories extended well into New South Wales, the Murray River was some 500 miles from Sydney, but only 150 miles from the seat of the Victorian government. The river became a significant political boundary for both administrations, each passing the buck for the responsibility of the Yorta Yorta. The Victorian Administration of 1860 played the boundary card by requesting the New South Wales Government to take responsibility and the New South Wales Government refused to provide assistance until its Protection Board was established in 1883 (Barwick, 1972:15, 40; see Chapters 7–9 for Yorta Yorta views on Murray River as a political boundary).

The Victorian Protection Board was the first to introduce special restrictive laws to control Indigenous people. Statutory authority for the Victorian Board was provided under the
Aborigines Protection Act 1869 (Vic). The Act gave the Board wide discretionary powers: to control the lives and movements of Kooris; to relocate them to reserves and to remove children to reformatory schools. The origins of the Stolen Children Inquiry a century later can be traced to the Victorian Legislation (Edwards and Read, 1989:20; Barwick, 1972:14; Broome, 1994:174; Jackomos and Fowell, 1991:16, 180–3; HREOC, 1997).

Further restrictive laws were enacted under the Aborigines Protection Act 1886 (Vic) and the Aborigines Act 1910 (Vic) which gave the Board powers to define who was an Aboriginal person according to biological and physical characteristics, and to exclude Kooris from those benefits that were available to other citizens. These exclusory laws were further complemented by Commonwealth laws that denied Aborigines citizenship rights enjoyed by other Australians (Rowley, 1972a: 25; Chesterman and Galligan, 1997:1–10; Peterson and Sanders, 1998:1–28; Read, 1998:169–77).

The 1869 Victorian legislation was duplicated by New South Wales in 1909, giving it equivalent powers to relocate Aborigines to government-controlled reserves. From the end of the resistance to the establishment of the State Protection authorities, the Yorta Yorta continued to utilise introduced structures. They integrated the ration depots into the traditional economy, utilised the pastoral stations as a means of coexistence and supplemented pastoral activities with subsistence practices. The Moira Station, located on the edge of the Moira Forest, will be used as a case study in the relationship between pastoral leases and Native Title rights. The Moira lands are connected with the ancestors of some 1,530 Yorta Yorta people (see Chapter 9 at 9.4.2 Yorta Yorta Ancestors; Hagen, 1997–98, Exhibit: A17, A67; Chesterman and Galligan, 1997:121–56; Barwick, 1972:14; Victorian Aborigines Protection Board Annual Report, 1861:4).

The Moira pastoral lease (1842–61) will be examined in light of Wik Peoples and Thayorres People v Queensland (1996) 141 ALR 129 (Wik). I will analyse the nature of the lease, and the extent to which pastoral and Indigenous interests co-existed. The case study is used to support the proposition that pastoral lands were an important part of the patchwork of lands that supported continuous Yorta Yorta connections.

10 Co-existence in the Claim Area: A Case Study

The question of co-existence in the YYNTC was raised in November 1997, when the Federal Court visited Moira station. The Court heard evidence at a traditional ochre site that is still used by the Yorta Yorta. This evidence included Yorta Yorta connections with the Moira lands that were raised in the Crown Land Commissioner's evidence to the 1845 Select Committee Inquiry on the Aborigines. The Commissioner had commented on the
'mutual arrangement' that had been developed between the station owner and the Indigenous residents (Minutes of Evidence taken before the Select Committee, 1845:39–40).

In light of Wik, the implications were that concurrent interests seemed to have been recognised in the Moira Lease that allowed for coexistence. It was no coincidence that the High Court was then (late November 1996) preparing its verdict on Wik, which was handed down in December of that year. Before Wik, it was unclear whether or not pastoral leases granted exclusive possession and therefore extinguished Native Title or whether both interests co-existed (Tehan 1997:7; Hiley, 1997:1–4; Wik Peoples and Thayorre Peoples v Queensland (1996) 141 ALR 129; Frank Brennan, 1993:35–6; Reynolds, 1987:143–4).

The question of pastoral leases was not at issue in Mabo. Deane and Gaudron JJ. found that a lease conferring exclusive possession would extinguish Native Title, while Toohey J. held that the question 'must remain unanswered in these proceedings' (Mabo (No. 2) 1992, Deane and Gaudron JJ. at 65, Toohey J. at 43, Deane J. at 35). The presumption was that if the lease reserved to Aboriginal inhabitants their traditional rights to subsistence from the land and waters, Native Title rights may continue. The extent to which they could co-exist in accordance with the reservation clauses was a matter that needed to be determined (Stephenson, 1997:104).

The issue was dealt with in Wik, the majority finding that those pastoral leases granted under Queensland Land Acts of 1910 and 1962 did not confer exclusive rights of possession and did not necessarily extinguish all incidents of Native Title. While the Court ruled that both titles could co-exist on the particular leases, setting aside the question of Native Title, it held that other cases raising similar questions of law needed to be assessed on a case by case basis. The majority in Wik found that pastoral leases 'did not give exclusive rights to pastoralists' (Wik (1996) Toohey J. at 173, Gaudron J. at 206, Gummow J. at 224–6 and Kirby J. at 256). The case also revealed significant moral shortcomings in the law that could only be rectified by the acquisition of land that would allow the Wik and Thayorre Peoples to continue their traditions and customs (Flood, 1997:21; Bachelard, 1997:61–5; Hiley, 1997:1; Hunter, 1997:6–18).

The issues raised in Wik added further weight to the question of Native Title and pastoral leases in the YYNTC. Being one of the largest pastoral stations in the claim area and its connections with a substantial Yorta Yorta population gave it added significance (Hagen, 1996:120). Two issues were at point:
1. Was it just a mutual arrangement between the station owner and the Yorta Yorta or was it part of the prevailing land policy, designed to protect Indigenous rights?

2. Given that there is evidence of co-existence in the Yorta Yorta oral testimony, what was the nature of the relationship?

These matters will now be examined in light of Mabo and Wik.

Imperial land policy dictated the nature and conditions of pastoral leases in Australia. They were adapted to accommodate Australian land topography and to protect the interests of Indigenous people occupying pastoral lands (Reynolds, 1992:14; 1993:120). Provisions were incorporated in leases to protect Indigenous rights of continued access and use of the land. As Reynolds explains, the reservation clauses were a means by which the distant Imperial authorities could preserve Aborigines from being exterminated. As indicated, the reports of Indigenous human rights abuses and the concerns raised about Indigenous land rights were of increasing concern to the Imperial and local authorities (Reynolds, 1993:119–31; G.A. Robinson Papers, Vol. 25, ML. MSS. A7035, Historic Records of Australia, 1854; Dredge, 1844).

The repeal of the Wastelands Act 1855 incorporated Aboriginal rights in Australian pastoral leases (Reynolds, 1993:128; 1992:14). This gave authority to government to legislate for the dispersal of crown lands and to recognise Aboriginal use and occupancy. Indeed, it meant that from 1855 onwards, leases were encumbered by a reservation clause that preserved Indigenous rights of access and occupation. Such reservations still exist in pastoral leases in Western Australia, South Australia and the Northern Territory. They were later removed in ways that are still not clear in Queensland and New South Wales.

Reservation provisions are of critical importance, and since Mabo and Wik the courts have begun to clarify their meaning in Australian law. The President of the Native Title Tribunal, Justice French, together with the High Court (Wik) declared that reservation clauses do what the 19th Century British government officials intended them to do and that is to preserve Native Title.

Given the existence of Aboriginal interests in pastoral leaseholds, I will now re-examine the extent to which co-existence functioned at Moira Station. The critical issue is whether the coexistence that was evident at Moira Station was part of this policy (Goodall, 1996:44–6; Reynolds, 1992:14; 1993; (Wik Peoples and Thayorre Peoples v Queensland (1996) 141 ALR 129; Bartlett, 1993a: 12).
The Moira leases were initially located beyond the settled districts of the Crown Land Commissioners region (the Murrumbidgee District). An initial grant of 112,000 acres was made to Henry Lewes and Charles Throsby in 1848 at an annual rent of 380 pounds or 31 pounds 8 shillings per month. Moira's grazing capabilities at the time were for 3,000 cattle and 4,000 sheep. The land was bounded on the east by the Gulpa creek – an anabranch of the Murray – and by the Murray itself to about three miles below the junction of the Campaspe River. By 1865–66, the size of the Moira run had increased to 128,200 acres. In 1869 the lease, subject to renewal after five years, was transferred to John O'Shanassy (Government Gazette (NSW) 29 September 1848:2B1–2B2; Legislative Assembly (NSW), Votes and Proceedings 1859–60:2C1; Legislative Assembly (NSW) Crown Lands Held Under Pastoral Occupation, 4 April, 1866:2F1–2F2).

The reserve clause protecting Yorta Yorta rights appears in the 1869 lease to O'Shanassy. Under the Crown Lands Occupation Act 1861 (NSW), the lease included access rights to resources and water and 'reserved to the Aboriginal Inhabitants free access' to the land, and resources for subsistence purposes (Lease for Pastoral Purposes: Crown Lands Occupation Act 1861; Leases for Pastoral Purposes, 1869:2A1–2A2).

There is unequivocal evidence that the Yorta Yorta ancestors who were living on Moira in the late 1800s had a legal right to do so, and by the very nature of the right were in occupation of the surrounds (NTA, s. 223).

Coexistence at Moira and other pastoral lands was driven by the mindset of colonial policies and the reality of Yorta Yorta occupation. An iniquitous relationship evolved from the circumstances of the time and continued into the 20th Century. It is the nature of the relationship, however, that is important for establishing the continuity of Native Title rights. The origins of the pastoral industry in the claim area owes its existence to the contribution that the Yorta Yorta made through their labour, bush skills and knowledge of natural resources. It owes its existence to the contribution of Yorta Yorta women, many of whom were exploited and sexually abused by pastoral workers. Daniel Matthews' diaries indicate the value of Indigenous labour and the reactions of local pastoralists particularly when the women were enticed away from the stations to the Maloga Mission (Gumbert, 1984:20–2; Rowley, 1986:133–4; Hardy, 1966; Broome, 1994:140–1; Aborigines Protection Act 1869 (Vic) and 1886 (Vic); Aborigines Protection Act 1909 (New South Wales) and 1915 (New South Wales); Reynolds, 1981:106–87; Christie, 1979:53–80; Cannon, 1993:141; Lewes, 1883:7–8; Curr, 1965:89–97).
10.1 Pastoralists' Anger at Loss of Indigenous Women

Matthews' diary entries for 1874 record the following exchange.

'Mr. O'S [hannassy] referred to the Blacks I had taken away – alluding to the girls Lizzie and Sarah he said, 'You have got two nice Gins for yourself... He had been drinking and was pale with rage – Besides you have got the Blacks down there to burn off – how many acres have they done?' Matthews replied, 'They have never done an hour's work for us, Mr. O'S, and we intend protecting these poor girls from such men as they meet at the Stations' (cited in Cato, 1976:47).

Access to free labour and the exploitation of Aboriginal women was rampant on surrounding pastoral stations: 'Each station had its Blacks’ camp, with its quota of young girls for the use of the station hands, and sometimes the squatter's sons'. In the first years at Maloga, every young women admitted to the mission were carrying children to white fathers, though many were thirteen and fourteen years old' (Cato, 1976:33). Venereal diseases transmitted by European men caused sterility among many of the women, and the European fathers of children to Yorta Yorta women did not stay around. As one Yorta Yorta elder remarks, 'like so many of the white fathers who disappeared into the sunset the children stayed with their mothers' and were brought up within the Yorta Yorta community (Atkinson, W., 1981a: 58; Hoffman and Jackomos, 1997, personal communication; Barwick, 1972:45–7).

Squatters exploited Aboriginal workers in other ways and used them as dummy selectors. Under the *Crown Lands Alienation Act 1861*, any person could apply for the conditional purchase of between 40 and 320 acres, for one pound per acre. While the scheme was conceived with the best intentions, the 1861 legislation, according to Lang, led to more abuse than any prior land legislation of the Colony. It created a class struggle between squatters and selectors that led to frequent bloodshed and blackmail that was euphemistically called 'dummying' and 'peacocking'. A 'dummy' was a person who selected an area, then complied with the occupant’s condition and sold it by pre-arrangement to a squatter. 'Peacocking' meant selecting the best part of the run, particularly that of prime river frontage land. Squatters did this to prevent selectors from making an effective selection and selectors did it to hold squatters to ransom by selecting the best part of a run and then offering it for sale to squatters at an outrageous price (Merlan, 1999:40–1; Lang, 1973:107–8; Morris, 1970:99).

John O'Shanassy is said to have selected and paid the deposit for river frontage land in 'the name of two Aborigines, as dummy selectors'. The land was part of the original Moira lease
on which John Atkinson (son of Granny Kitty) erected a bark hut for his wife and children, and cultivated some acres of wheat (Buxton, 1968:158).

Under these arrangements, Aborigines were technically co-occupants, but in practice they were tenants at the will of the pastoralists. The prevailing circumstances worked to the advantaged of the pastoralists. Indigenous workers were paid in rations and tobacco in return for their labour, and the pastoral economy could supplement itself by tapping into the Indigenous subsistence economy. The surrounding Moira forest and lakes were rich in bush tucker. Being a 'great stronghold' for the Yorta Yorta, it provided a regular and sustainable food supply (Goodall, 1996:61–8; Curr, 1965:76; Matthews, 1889:50; Morgan, 1952:4; Cannon, 1993:141–2).

10.2 Nature of Relationship

There is unequivocal evidence of co-existence, but the relationship was really a one-way process. Equality and protection of rights were non-existent. There may have been provisions for the exercise of concurrent rights but in reality Yorta Yorta rights were subordinate to pastoral interests. In hindsight, it was a relationship of survival. The Yorta Yorta used the pastoral lands to assist in their recovery from the ravages of colonisation and the effects of terra nullius (Yu, 1994a: 21). It was a last resort strategy that was adapted to the circumstances of the time. Using whatever land was available to maintain connections and combining traditional practices with pastoral activities was indeed a clever strategy.

Similar arrangements developed on other stations within the claim area. Yorta Yorta people lived and worked on the larger stations of Tongala, Perricoota, Madowla Park, Wyuna, Gunbower, Ulupna, and Toolamba. They quickly adapted to pastoral activities. Indigenous knowledge and skills were invaluable resources. Yorta Yorta ancestors were able to bolster their position as the original occupants by manipulating the available lands and resources to their favour (Merlan, 1999:40–7; Goodall, 1996:61–8; McGrath, 1995:22–6; Curr, 1965:25; Priestly, 1965; Coulson, 1979; Cato, 1976:42; Echuca Historic Society, 1997; and see Chapters 8–9 for Yorta Yorta Evidence of Survival).

Co-existence, with all its inequities, functioned at various levels within the claim area. The pastoral lands are important linkages but there were other traditional lands that formed the patchwork of cultural continuity. These were the reserved lands of Maloga and Cummeragunja (Merlan, 1999:40–7; Hagen, 1996:110; Harris, 1995–98, 7:142; Cato, 1976; and see Chapters 8–10 for Genealogical Evidence).
11 Maloga Mission 1874–88

The Maloga Mission was established in 1874 on land selected by Daniel and William Matthews. As indicated in Chapter 2, the site was an important meeting place for Indigenous groups and the place where the river cut its most recent course, 8,000–10,000 years ago (see Chapter 2; Cato, 1976:28; Barwick, 1972:45–7).

On setting up Maloga, the Matthews brothers were quick to understand the nature of the political boundary presented by the Murray. For the Aboriginal residents of Maloga, however, the river was not a political boundary. The majority were from the local Yorta Yorta who occupied both sides of the river, and some came from neighbouring tribes from the upper and lower reaches of the Murray. Maloga was intermittently occupied by the Yorta Yorta between 1874 and 1888, many of whom continued to camp at traditional places in the bush, along the rivers and at pastoral stations. With the creation of the NSW Protection Board in 1883, a new site of 1800 acres upstream from Maloga was reserved. This was 'Cummeragunja' ('Cummera' as it is affectionately known), a word derived from the local Yorta Yorta language meaning 'our home'. Residents of Maloga were moved to Cummera by the NSW Protection Board in 1888–89 (Hagen, 1996:112; Barwick, 1972:45–6).

12 Cummeragunja 1888–present

Both Maloga and Cummeragunja were important places for the Yorta Yorta to regroup and to rebuild as a community. They allowed the Yorta Yorta to re-assert their inherent rights and Cummeragunja played an important role in the struggle that culminated in the YYNTC (Shepparton News, 22 September 1999; Broome, 1994; Horner, 1974; Aborigines Advancement League, 1985; Barwick, 1972:45, 65–8).

From 1860 to 1999, the Yorta Yorta have made at least 18 attempts to claim land and compensation. The chronology of claims in Appendix 1 illustrates the historic nature of the struggle. Some of these were made on behalf of the Yorta Yorta; others were made by the Aborigines Advancement League established by William Cooper in the 1930s, and some by the Yorta Yorta Clans Group 1983–99. The more favourable political climate of the 1970s provided the Yorta Yorta with the opportunity to re-assert their claims with a greater prospect of success. Formal approaches for greater control over Cummeragunja and for the return of the Barmah Forest and other areas were subsequently developed. Mabo ushered in a new era of law that increased Indigenous hopes of land justice.
13 Ongoing Struggle

It is more than a hundred and fifty years since the Yorta Yorta fought against the white invasion of their sovereignty. Since then Yorta Yorta society has continued to adapt to social, technical, environmental and economic changes.

While the majority of these changes were forced ones, the Yorta Yorta responded in their own courageous way by utilising the limited options available. Today the Yorta Yorta remain a coherent and distinct community, emphasising their ties of kinship and regional affiliation in their dealings both with white society and with other Aboriginal groups (Barwick, 1972:16; Broome, 1994:80–4; Aboriginal and Torres Strait Islander Social Justice Commissioner Report, 1995:94–105).

The resilience of Yorta Yorta survival and pride in their identity is expressed by current leaders like Monica Morgan:

We know we exist, we know we have continued to exist, that no practices that have ever occurred on Indigenous people, of genocide, removal, taking away of people, continuing denigration happening in Australia today, is ever going to take away the pride and dignity of Yorta Yorta people (Shepparton News, 22 September 1999).

14 Yorta Yorta Today

The people who identify as Yorta Yorta/Bangerang are the descendants of the original people who occupied the lands at colonisation. The Yorta Yorta asserts that they have never relinquished their sovereign rights to territories occupied by their ancestors. Given the interference of those events described by Mabo as external factors, the Yorta Yorta have continued to live on the traditional lands and to exercise traditional rights to use resources, and continue cultural practices (Hagen, 1996:1; Aboriginal and Torres Strait Islander Social Justice Commissioner, 1995:94–6; Yorta Yorta Statement of Claim and Contentions 1994–95).

Yorta Yorta connections with the claim area remain strong (Australian Bureau of Statistics: National Aboriginal and Torres Strait Islander Survey, 1996; see also Department of Conservation, Forests & Lands (Vic), 1992). Figures from the 1996 ABS survey indicate that a significant proportion of the Yorta Yorta population continue to regard the area as their traditional homelands. Other reports that correlate the legacy of land loss with current health concerns support continued Yorta Yorta connections (Alford, 1999:39–42; McKendrick, 1999).
The majority of Yorta Yorta live in the townships of Echuca, Moama, Shepparton, Mooroorpa, Cummeragunja, Barmah, Nathalia, Finley, Cobram, Kyabram, Wangaratta and Mathoura, and other smaller centres within the lands. Some live nearby at Albury, Wodonga, Deniliquin, Kerang, Barham and Swan Hill. Others have moved to the cities to pursue educational and economic interests, most of whom still visit the area regularly to maintain social and cultural links (ABS, 1996; Hagen, 1996:6–8; *Yorta Yorta Land Management Report*, 1999:10; and see Chapters 8–9).

The existence of narrower sub-groupings has evolved into broader interests within the area. This is reflected in the name of the organisation set up to represent Yorta Yorta people in land and heritage matters – the Yorta Yorta Murray Goulburn Clans Inc. The events of the last one hundred and fifty years have resulted in the Yorta Yorta placing greater emphasis on their broad unity and inter-relationships and less on narrower interests. For most practical, political and administrative purposes the Yorta Yorta are one group (Yorta Yorta Murray Goulburn Rivers Clans Group Inc, 1989–1998; Hagen, 1996).

The Yorta Yorta have set up organisations to service the needs of their people in housing, health, education, employment, land and heritage matters. These organisations have provided mechanisms through which the Yorta Yorta have been able to deal with governments on both sides of the Murray.

Many of the Yorta Yorta were instrumental in the fight for civil and political rights leading up to the 1967 Referendum. They established the first Aboriginal organisations in Melbourne and Sydney in the early 1930s. Some of the early leaders were active in highlighting similar injustices in other parts of Australia in the 1950s and in assisting those Victorian communities that gained some land justice in the 1970s and 1980s (*Aboriginal Land Act 1970* (Vic); Aborigines Advancement League, 1985: 55–84; Horner, 1974:68–80; Barwick, 1972:16; Broome, 1994:80–4; Goodall, 1996:230–58).

Yorta Yorta people predominantly run the intricate network of community-based organisations in the claim area. The Yorta Yorta Clans Group, now replaced by Yorta Yorta Nations Inc, acts as the head organisation for land, water and cultural matters. It is modelled on traditional structures in which representatives are democratically chosen from family groups to form a Council of Elders and Governing Committee.

**15 Conclusion**

The chronology demonstrates that Yorta Yorta connections have never been washed away by so-called tides of history, and there has been a continuing process of political struggle. The history of occupation and race relations exposes the 'tide of history' as another
euphemism that was used to cover over the underlying issues of land justice. The application of the tide idea in the YYNTC was like rubbing salt into the deep wounds that are yet to be healed. The history militates against the principles of a fair and just society, and demands that the law be brought into line with the values of justice and racial equality. The next chapter examines land justice in the broader context and focuses on the amount of traditional land that has been returned to the Yorta Yorta before *Mabo*.

Dr Wayne Atkinson
9 January 2003