women and the criminal justice systems of the several Australian States and Territories. Paradoxically, despite the heavy over-representation of these women in custody, and the fact, revealed by the RCADIC Report, that eleven had died in custody, this is a relatively neglected area in legal studies with a minimum of academic literature. Whether a new dawn is emerging for these women with respect to law and justice as a result of the Royal Commission and the Overview paper containing the initiated response of the several governments on new directions in the criminal justice area remains to be seen. However, it is not helpful to be cynical and dismissive of the expectation for a better future, even though the imprisonment rate for Aboriginal women in New South Wales has shown little evidence of abating. Again, although many of the changes proposed in certain fundamental areas of Aboriginal and Torres Strait Islander life, of necessity, will be long-term in nature, the seeming determination of governments to achieve more immediate changes in the various administrative sections of the several Australian criminal justice programmes, inspires the expectation of a noticeable reduction in the excessive over-representation of Aboriginal and Torres Strait Islander women in custody. Hopefully, it is time for optimism.

The Yorta Yorta Struggle for Justice Continues

Wayne Atkinson

Since the advent of the European invasion into Yorta Yorta Lands in the 1840s, the Yorta Yorta people, through their representative organisations, have been continually seeking justice for the dispossession of their land and the destruction of their traditional culture and heritage.

The purpose of this chapter is to put in context the recent claim by the Yorta Yorta, which has been lodged with the High Court. The claim is for the return of areas of land that formed part of their traditional lands, and for compensation for loss of land and the destruction of culture and heritage.

I Background History

It is important to understand the Yorta Yorta’s history to demonstrate their continued struggle for justice.

The Yorta Yorta people occupied a unique stretch of territory located in what is now known as the Murray-Goulburn region.

The Yorta Yorta lifestyle was based on hunting, fishing and collecting food. However, being river based people, most of their time was occupied by fishing, as the majority of food was provided from the network of rivers, lagoons, creeks and lakes which were and still are regarded as the life source of the Yorta Yorta people. The annual floods that occur in this region are regarded by Yorta Yorta people as necessary for the replenishment of food sources and the survival of the forest.

The original Yorta Yorta territory was both rich and abundant in natural food sources. Archaeologists refer to this type of environment as a broad-based economy which is capable of producing a broad range and variety of food. Indeed the first white intruder to have contact with the Yorta Yorta commented on its richness and recorded in his
recollecions that the area could have supported “twice the population” he encountered there in 1843.1

In relation to population density, the Murray Valley region was regarded as one of the most heavily populated regions in Australia before colonisation. By comparison with other areas, the Murray Valley was capable of carrying a much higher population density than the less fertile and more arid regions in Australia. Evidence to support this, such as the abundance of mounds (camping and cooking places), the fish trap systems, and middens (build up of shell fish), indicates that the Murray Valley which includes the Yorta Yorta territory, was intensively utilised by tribal groups. The population of the Yorta Yorta before contact is estimated to be approximately 2400.2

Against this brief background one can reconstruct a rather idyllic picture of the traditional Yorta Yorta lifestyle. It is clear that the people did not want for anything in terms of food and security, and their lifestyle fits nicely into the picture of hunter-gatherer societies which Sahlin describes as “the original affluent societies”.3 This concept applies to those traditional societies which lived a relatively rich lifestyle because of the abundance, variety and continuity of food resources; the quest for food required a minimal amount of energy input thus allowing a large amount of time for leisure activities. In this context, the average amount of time the Yorta Yorta spent in acquiring food was about three-and-a-half hours per day, and the rest of their time was devoted to the development of cultural traditions and philosophy. When considered in light of today’s work input and leisure hours, this is a rather ideal situation in which, if not all, people would like to live.

Whilst this image may provide us with an idyllic situation, it must also be said that there were difficult times and Yorta Yorta society was not totally free of upheavals and conflict. However, it does seem that they were able to deal with these situations as they arose and social cohesion was maintained. But most importantly their links with the tribal land – the basis of their cultural identity and existence – were unbroken since time immemorial. The integrity of this lifestyle and culture speaks for itself, and the most outstanding aspect is that whatever the difficulties may have been, the Yorta Yorta survived most admirably.

II European Invasion

The arrival of Europeans had a devastating impact on traditional groups such as the Yorta Yorta. Within the first generation of the European invasion, the Yorta Yorta population was reduced by 85 per cent. All indications at that time, particularly when viewed against the extent of this destruction, were that they would eventually have been wiped out as a distinct cultural group. Their ability to withstand these forces and to survive as a people is an amazing example of the strength and courage of Aboriginal society, and a sad reflection on the misguided beliefs and brutality of the perpetrators of this large scale genocide.

One has to be cautious of over-emphasising the ability of the Yorta Yorta to survive as these are events that the Yorta Yorta, and I’m sure the descendants and or beneficiaries of the perpetrators, would have preferred not to have happened. The reality is, however, that there were no choices available and these events are still a major legacy that the Yorta Yorta and the Koori community are dealing with today. Given the extent and intensity of those attacks on our land, culture and society, the effect of these events take a long time to heal in any people’s experience and are still major obstacles to the reconciliation process. The image of Kooris as great survivors needs to be treated cautiously because it tends to portray them as being immune to those injustices that they have had to suffer and which are still to be rectified. It also provides a diversion for those governments responsible for addressing the disadvantage and inequality that Kooris still experience on a day to day basis as a direct result of their dispossession and mistreatment.

The outcome of the frontier period in the Yorta Yorta region is analogous to other areas where the European invasion wrought havoc. The Yorta Yorta were dispossessed of their tribal lands and left to eke out an existence on the edges of European settlements as remnant tribal groups. As in other parts of the frontier, violence continued and the Yorta Yorta fought a sustained resistance struggle against the wholesale dispossession of their land. The further mistreatment and abuse of Aboriginal women by European men caused increased conflict and reprisals which were natural responses to colonisation wherever it occurred.4

The remaining Yorta Yorta population and other tribal groups from neighbouring areas were eventually relocated at Malogo Mission on the New South Wales side of the Murray River in 1874. Malogo was

eventually closed and the residents were relocated to Cummeragunja in 1888-89 which became the place where the Yorta Yorta were able to regroup after the holocaust. It also provided a base for the development of what became the Aboriginal political movement in the 1930s.

A small group of Yorta Yorta people, conscious of the legacy with which they were left as a result of the European invasion, were active in setting up the first Aboriginal organisations. These organisations, such as the Aborigines Progressive Association in Sydney in 1937, and the Australian Aborigines League in Melbourne in 1932, were responsible for raising the consciousness of the general community to the plight of the Aboriginal people. They demanded that Aboriginal people be given full citizenship rights, including the right to own land, self-determination and the right to retain their own unique cultural identity. Social justice and equity were a major part of their policy objectives and the issue of land rights and compensation were at the forefront of their struggle.

Both these organisations gained major achievements for Koori people in Aboriginal affairs, and were forerunners or springboards from which other organisations began, both at the State and the national level.

Other political activity in this period which involved Cummeragunja residents was the 1939 "walk off" in which the majority of residents packed up and walked off the Mission reserves in protest against the living conditions, the leasing of most of the reserve land to Europeans, and the repressive laws of the reserve system.

Whilst Cummeragunja residents were active on the broader front, they also fought their own struggle at the local level. Between the periods of 1860 to the present they have been continuously demanding land and compensation for the past injustices they have suffered.

As early as 1860, members of the Yorta Yorta demanded compensation from the Victorian authorities for the destruction of their natural fishing areas by paddle steamers. The demand was for a tax of 10 pounds (approximately $20) to be imposed on each steamer passing up and down the river, and to be expended in supplying food to the natives in lieu of fish which had been driven away. Whilst these demands were unsuccessful, they illustrate that as early as 1860, the Yorta Yorta ancestors were well aware of their natural indigenous rights and were quick to exercise them.

Following the 1860 action, there were continuous attempts to claim land and compensation which have been documented in a chronology of the Yorta Yorta people's struggle for land and compensation.

Between 1860 and 1993, there were approximately 17 separate attempts by the Yorta Yorta people to claim land and compensation. Overall, the only land that has been returned is 1200 acres of the former Cummeragunja Reserve, which was originally 2965 acres. This land was granted to the Yorta Yorta Land Council in 1983 by the New South Wales Government under its land rights commitments. The land, which was granted under inalienable freehold title, is a mere pittance when measured against traditional Yorta Yorta territories. It amounts to no more than a tenth of 1 per cent of their tribal lands, which measured some thousands of square miles.

III The Recent Claims

Now, I will look at the most recent claims for the Barmah and adjoining forests which were lodged in 1984 and 1993, respectively.

The 1984 claim was prepared by the Yorta Yorta Tribal Council, which has since been superseded by the Yorta Yorta Murray-Goulburn River Clans Inc (YYM-GRC). The claim was for the return of the Barmah Forest to its traditional owners and for compensation for its past use and the destruction of traditional culture. A prior unsuccessful claim to the same area, including the Moira Forest, was made to the Victorian Government in 1975 by the Aborigines Advancement League.

The 1984 claim and all other claims of the past, reflect the ongoing concern of the Yorta Yorta people for land, culture and for justice. The Yorta Yorta people have continued to exercise their natural rights as the indigenous occupants and owners of the forest. Furthermore, the Yorta Yorta people have shown through oral documentary and material evidence that their social, spiritual, economic and cultural links with the area have never been broken. In other words, they can clearly demonstrate that their relationship with the area has continued since time immemorial.

Today the forest is still regarded by Yorta Yorta people as a significant part of their tribal land which was taken from them by force, as the resting place of their ancestors, who are buried there and their spirits, and as the keeping place of their cultural heritage.

7 Ibid, p 5.
8 Victorian Aborigines Protection Board Report 1861, p 19.
9 WR Atkinson, Yorta Yorta Land Claim (Australian Institute of Aboriginal and Islander Studies, Canberra, 1985).
Legal basis for the claim

The legal basis for the claim, which was prepared in 1984, asserts that in 1967 a referendum was conducted in which an overwhelming majority of the people of Australia voted to amend the Commonwealth Constitution so that the Federal Parliament would have the power to legislate for the:

peace, order, and good government of the Commonwealth with respect to:

(xxvi) the people of any race, for whom it is necessary to make special laws.\textsuperscript{12}

This effectively gave the Federal Parliament over-riding powers in Aboriginal affairs with respect to the States. The Commonwealth is authorised by the Constitution to legislate with regard to specific matters; in the ordinary course of events, where a conflict arises between the State and Federal laws, the Commonwealth law shall prevail to the extent of the inconsistency.\textsuperscript{13}

The Australian Government is also a signatory to the International Covenant on Civil and Political Rights. Article 27 states:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such shall not be denied the right, in community with other members of their group to enjoy their own culture, to profess and practice their own religion or to use their own language.

The land is an inextricable part of Aboriginal culture, and the two are inseparable in Aboriginal belief.

The Commonwealth may, therefore, legislate to implement an international law or covenant, such as the above, pursuant to its external and foreign affairs power under s 51(xxix) of the Commonwealth Constitution.\textsuperscript{14} This power was asserted in the Tasmanian \textit{Franklin Dams} case in the High Court in 1983, along with the power under s 51(xxvi).\textsuperscript{15}

In addition to this, the Murray Island (\textit{Mabo (No 2)})\textsuperscript{16} decision has thrown new light on the situation. The implication of the High Court’s \textit{Mabo (No 2)} decision, in finally putting to rest the terra nullius legal fiction, is that there is a stronger case for indigenous land rights in Australia, where groups can establish they have continued links with certain areas.

In 1993, the Yorta Yorta lodged a claim under the Native Title Act 1993 (Cth). The current Yorta Yorta claim fits neatly into the \textit{Mabo (No 2)} formula and is further strengthened by the final \textit{Management Report}\textsuperscript{17} of the Victorian Department of Conservation and Natural Resources, which clearly recognises the Yorta Yorta people’s continued associations with the area.

**IV Land Rights legislation before Mabo (No 2)**

Victorian Kooris currently hold 0.013 per cent of their traditional lands which have been returned under various \textit{Land Acts} between 1970 and 1992. The following list provides details of those areas of land that the Victorian Government has returned to Victorian Kooris.

<table>
<thead>
<tr>
<th>Date</th>
<th>Place</th>
<th>Area (in hectares)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1970</td>
<td>Framlingham</td>
<td>200,000 h</td>
</tr>
<tr>
<td>1970</td>
<td>Lake Tyers</td>
<td>1,600,000 h</td>
</tr>
<tr>
<td>1987</td>
<td>Framlingham</td>
<td>1,130,000 h</td>
</tr>
<tr>
<td>1987</td>
<td>Lake Condah</td>
<td>53,200 h</td>
</tr>
<tr>
<td>1989</td>
<td>Thornbury</td>
<td>3,800 h</td>
</tr>
<tr>
<td>1992</td>
<td>Robinvale</td>
<td>3,789 h</td>
</tr>
<tr>
<td></td>
<td><strong>Total land</strong></td>
<td><strong>2991 h or 29.91 sq km</strong></td>
</tr>
</tbody>
</table>

In 1970, limited title to two areas of land was granted to the Lake Tyers and Framlingham Trusts. In 1987, the Victorian Government requested the Commonwealth to enact the legislation for the Lake Condah and Framlingham Forest which is now Aboriginal Land.\textsuperscript{18} Minor areas have also been granted at Thornbury and at Robinvale.

By comparing this amount of land with the original 227,600 sq km of territory occupied by Victorian Kooris, it means that they currently have regained only 0.013 per cent (one-hundredth of 1 per cent) of their original Native Title Land. This means that in real terms they have been dispossessed of more than 99.99 per cent of their traditional lands without any recognition of their prior ownership and occupancy rights or reparation for the loss of land and damage to life and culture.\textsuperscript{19}

On current analyses the status of Koori people as reflected in the amount of land they own in Victoria is appalling and the refusal to deal

\textsuperscript{12} Commonwealth Constitution, s 51(xxvi).
\textsuperscript{13} Commonwealth Constitution, s 109; \textit{Vikatuskas v Niland} (1983) 153 CLR 280.
\textsuperscript{14} \textit{Koolawari v Blythe Petersen} (1982) 39 ALR 417.
\textsuperscript{15} \textit{Commonwealth v Tasmania} (1983) 46 A LR 625.
\textsuperscript{16} \textit{Mabo v Queensland (No 2)} (1992) 66 ALJR 408.
\textsuperscript{17} \textit{Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987} (Cth), as cited in H McRae, G Nettheim, L Beacroft (eds), \textit{Aboriginal Legal Issues} (Law Book Co, Sydney, 1991), p 159.
with such matters in a fair and just manner is a shame on the Victorian Government. It also reflects badly on the attitude of some politicians, the media and certain elements of society who perpetuate the misguided perception that land rights is some sort of sinister exercise aimed at “taking people’s private land and backyards”. The reality is that the amount of land returned to Victorian Kooris is a mere pittance when one considers the vast amount of land that has been stolen from them.\(^\text{20}\)

The legislation enacted for Victorian Kooris shows a very careful approach to land rights legislation by the Commonwealth. Under the \textit{Aboriginal Land (Lake Condah and Framlingham Forests) Act 1987} (Cth), the Commonwealth refused an opportunity to acknowledge that the Aboriginal people were the traditional owners of the land, let alone acknowledging that their rights had never been extinguished. The Commonwealth also refused to give the Aboriginal owners of the land complete control over whether or not their land was to be mined, indicating that their ownership rights to land in this regard were similar to those of other Australian land owners. No real Native Title Rights, as in the \textit{Mabo (No 2)} judgement, were recognised such as the right to exclude others, the power of veto over mining and other activities that are considered to be incompatible with the enjoyment of Native Title.\(^\text{21}\)

The Victorian Government has demonstrated in these instances that land can be granted through legislation relating to specific areas. It can also call on the Federal Government, as it did with the above case, under the Commonwealth’s constitutional powers to grant land to Aboriginal communities in Victoria.

From this background it can be strongly argued that both the State and Federal governments have the power and legal mechanisms to rectify the injustices that Aborigines have suffered during the past two centuries.

Furthermore, the High Court’s \textit{Mabo (No 2)} decision has given the Yorta Yorta new hope of reclaiming what they regard as rightfully theirs.

The current claim when viewed in the context of all those past efforts to claim land will be the eighteenth attempt by the Yorta Yorta to settle the long outstanding issue of justice. As this claim is now before the Federal Court, no further comment can be made on its substance or the area being claimed.

It is important to note, however, that given the Yorta Yorta people’s strong links with the area, and their continuous struggle for land and compensation, it is still the main item on the Yorta Yorta agenda – justice must prevail in the long run.


\(^{21}\) O’Neill and Handley, op cit n 19, pp 448-450; \textit{Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987} (Cth); G Bird, \textit{The Process of Law in Australia Intercultural perspectives} (Butterworths, Sydney, 1994), p 329.