The Failure of the Native Title Process in the Yorta Yorta Case and Human Rights options.

The introduction of the native title doctrine in *Mabo* is often heralded as the turning point in Indigenous and non-Indigenous relations; a landmark in Australian law; a social and legal phenomena proposing to reconcile two independent traditions and to make amends for the import of two centuries of false legal doctrine. The development of common law native title however, as witnessed in *Yorta Yorta Aboriginal Community v State of Victoria* (1998) *(Yorta Yorta)* reveals a starkly different reality whereby the concept of native title and its underpinnings of Indigenous tradition is controlled, defined and constructed by the Anglo-legal legal system - a legal and political situation whereby the requirements of proof imposed on Indigenous applicants as evidenced in our case, has become a colonising force in itself – settler colonization more subtle but still produces the desired outcomes of domination, control and marginalisation by the settler state.

While the High Court decision in *Mabo* was groundbreaking in its elimination of the fallacy that Britain gained ownership of the land at the imposition of their sovereignty, it did not serve to eradicate the notion of *terra nullius* from the Australian psyche. As witnessed in my peoples struggle for land justice the barrier of *terra nullius* has since been replaced by the Tide of History as another trope for dispossession. *(Yorta Yorta Aboriginal Community v. State of Victoria 120021 HCA 58)*. The sequential barriers process is alive and well in Australian politico-
legal discourse. That is no sooner you knock one over, and get within reach of embracing the human rights principles of justice equality and fairness before the law the dominant settler culture is quick to protect its interest by constructing other barriers that subordinate Indigenous entitlements.

The *Yorta Yorta case* is one example where the laws and customs of the Aboriginal claimants had to adjust to fit within an Anglo centric framework. Olney’s conclusions that Yorta Yorta connections did not concur with the cursory observations of a white pastoralist and that the tide of history euphemism, as it was construed from Mabo, had washed away our title to land, is a prime example of internal colonization at play in 21st Century Australia (Edmund Curr did not pen his observations till 40 years after his intermittent stay in Yorta Yorta country).

Unpacking what constitutes ‘tradition’ according to western notions of tradition and continuity of connections with country became the crucial issue in the *Yorta Yorta* case. One must also be aware that by the time the Yorta Yorta got to the High Court it was of a different composure to that of Mabo. The need for capital C conservative appointments to the HC to keep a lid on Indigenous based rights and bucket loads of extinguishment to wipe out existing native title rights were already set in train.

Within six months of this statement, the Coalition government filled three vacancies on the bench, and following the premature departure of
Justice Mary Gaudron in February 2003, this made the fourth. With a majority of four appointments to the HC, since Mabo The Law Institute of Victoria has characterized these appointments as the final act in the Howard government’s conservative judicial agenda, entrenching a conservative majority on the bench and thus reshaping the direction of the Court to match its political aspirations. Against this background it has become very difficult to get and rights based issues up in the HC including gender, refugees and native title as witnessed in the Yorta Yorta case. It seems that Howard has not only got the numbers in government but he also has them on the HC.

There are some other developments on the NT front in Victoria that have arisen since the Yorta Yorta case that need to be considered particularly in relation to Justice Olney’s judgment in the Yorta Yorta case.

Three important cases have transpired since the Yorta Yorta that sends spears and a big nulla nulla to the Olney Decision.

Cases that have transpired since the Yorta Yorta case have sent big spears

Wotjabaluk, Native Title Consent Determination, 2005: This was a case that resulted in a consent determination following a process of mediation which was regarded as the first native title determination in Victoria. Determination delivered limited rights to ownership and control of their ancestral lands. Permissive occupancy rights to 15.7 hectares of traditional lands which amounts to 0.0017 of the traditional
lands. One needs to add this to the pathetic 0.014 percent of Victoria that has been handed back to Indigenous people since invasion. Many Indigenous people see this as another form of dispossession-back door dispossession. Justice Merkel rejects the tide of history in the Wotjabaluk case.

Nyoongar Native Title Case, 19 September 2006: Native Title Determination by Justice Wilcox of Federal court, recognizing Nyoongar people of Perth traditional owners of some crown lands within the metropolitan region of Perth. Determination flies in face of Justice Olney’s decision in the Yorta Yorta case and the notion that native title has been washed away in the more settled regions of Australia. Justice Wilcox accepted the changes were a result of massive disruptions caused by colonization-the underlying causative effects of land loss whereas Justice Olney uses the tide of history metaphor from Justice Brennan and others judgment in Mabo, 1992 to justify his decision of extinguishment in the Yorta Yorta. Nyoongar case appealed and may go to High Court which has been stacked with Capital C conservatives.

Gunditjmara Native Title Consent Determination, 30 March, 2007: Gunditjmara Native Title Consent Determination. Recognises Gunditjmara as traditional owners and grants native title to some areas of land which is a positive outcome however when considered against the framework of land justice and standards of justice equality and fairness before the law as set by the United Nations charter of Human Rights the right to own property and to not be arbitrarily deprived of
such fundamental rights land justice for Indigenous Australians does not reinstate the exclusive rights enjoyed by Indigenous people and their inherent rights to the ownership, and control of land and resources.

Three cases do fly in face of Justice Olney decision rejecting arguments that he constructed as barriers to NT in Yorta Yorta case and recognizing the existence and the validity of the oral testimony of the claimants.

Highlights the long protracted, draining and expensive process of native title which in the final analysis has been reduced from the status of full exclusive rights in Mabo to that of permissive occupancy in the reported cases and confirms the perception of some Indigenous people and former claimants in the Yorta Yorta that native title has delivered not one iota of real land justice and the native title process as witnessed in Victoria may be another form of dispossession this time by the back door-back door dispossession.

Also makes a mockery of the Human Rights framework of justice equality and fairness before the law, principles of which were pervasive in the Mabo decision. That is

Article 17 of the UN Declaration 1) Everyone has the right to own property alone as well as in association with others.

2) No one shall be arbitrarily deprived of his property.

This provides a framework that can be used to examine what Human
Rights options are open to the Yorta Yorta given the failure of the Native Title process.

International Options for Yorta Yorta.

There are only a few limited and long international roads that may help increase pressure on state governments in Australia to acknowledge the reality of Yorta Yorta people’s history of occupation and ownership of country. Some of the options might be able to be pursued together, but all would need to be part of a broader approach trying to get governments to accept the need for some international action to resolve the current quagmire that has been created. There is little prospect of any international enforcement of a solution, but international options might be able to help change the degree of denialism and bloody-mindedness evidenced by the current Howard Government.

Complaints to UN Human Rights Treaty Monitoring Committees

It would be possible to complain about the denial of Yorta Yorta identity to either the Human Rights Committee (which monitors the Covenant on Civil and Political Rights) or the Committee on the Elimination of Racial Discrimination (which monitors the Convention on the Elimination of all Forms of Racial Discrimination). These committees are part-time bodies composed largely of international legal experts. It is quite probable that either complaint would be endorsed by the relevant committee, but these committees don’t have any power to enforce their decision on Australian governments, so the main result
would be to expose the governments to shame internationally—a path that has been successfully used in the past by Indigenous Australians but one that the current government is likely to ignore. The substance of a complaint to the Human Rights Committee can’t also be sent to another committee, so a choice must be made between complaining to that committee or the one that monitors CERD (the treaty to eliminate all racism). This choice might be affected by the terms of the two treaties, since any complaint has to be directly linked to an article in the relevant treaty. The International Covenant on Civil and Political Rights begins by stating that “all people have the right of self-determination”, to “freely determine their political status”. (art 1) In recent years a Maori tribe (Ngati Porou) have complained on this basis. A complaint could be linked to articles 26 (“all persons are equal before the law and are entitled without any discrimination to the equal protection of the law”) and 27 (right of minorities “to enjoy their own culture”). A complaint to the CERD committee might be more effective because it has recently reviewed the Native Title Act and declared it discriminatory. Equality before the law is protected by article 5 including points a) “equal treatment before the tribunals and all other organs administering justice”; v “the right to own property alone as well as in association with others” and e) vi “the right to equal participation in cultural’activities”. There has just been a successful complaint to CERD about a racist grandstand sign in Toowoomba (Hagen case) but the government again turned its nose against the finding.

**Getting a state to take Australia to the International Court of Justice**
The International Court of Justice is another option however only nation states are able to present cases there, so it would be necessary to find a sympathetic state with resources and commitment that would not be victimized itself by Australian threats; and ii) even if some such state is willing to assist, the Court has no power to force any state to accept its jurisdiction so the Australian government could refuse to participate (as Indonesia did concerning East Timor’s case which was taken to the ICJ by Portugal against Australia in the 1990s).

These obstacles mean it is unlikely that the International Court of Justice will be of any use, because the Australian government will choose not to participate instead of risk the greater shame of getting a finding against it.

Only other option available to the Yorta Yorta is to continue the struggle for land justice on the political front through the campaign for a National Park that will recognise Yorta Yorta as the traditional owners under a joint management arrangement similar to those successfully operating in Australia, in the NT (Kakadu, Ulluru and Boodaree National Park on the south east coast of Australia in the ACT.

That’s is where the struggle is currently at and THANK YOU.