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**Balancing the scales of Indigenous Land Justice in Victoria, 2006**

**Dr Wayne Atkinson**

Dr Wayne Atkinson is a Senior Lecturer, Indigenous Studies with the Department of Political Science at the University of Melbourne. He is a member of the Yorta Yorta and Dja Dja Whurrong Indigenous Nations of the Murray Goulburn and Central Victoria regions and has worked in Aboriginal Affairs for most of his life, specialising in research, writing, teaching Indigenous studies, and in land and heritage reform.

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**Abstract**

*This paper assesses what real gains were made, through the Wotjobaluk Native Title Consent Agreement, 2005, in the context of Indigenous land justice in 21st Century Victoria. It analyses the relationship between the Merkel J. Federal Court determination in the Wotjobaluk case, and the Yorta Yorta Native Title claim (1994-2002), and argues that the Wotjobaluk case may well be another act of dispossession, this time through the native title process.*

On the 13 December 2005, the Federal Court signed off on a Native Title Consent Agreement between the *Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples v State of Victoria* [2005] FCA 1795 and settler interests, in the Mallee-Wimmera region of Victoria (the Wotjobaluk Claim). After a long and protracted journey through the native title quagmire (1995-2005), the claimants were granted “permissive occupancy” rights to two percent of their ancestral lands. This means they are allowed to visit limited areas confined mainly to a thin strip of river bank. The extent to which the original and oldest land title has been compromised in order to allow traditional owners to gain access to a small fraction of their ancestral land and waters in the Wotjobaluk case invites rigorous scrutiny. It also needs to be factored into the derisory record of land justice in 21<sup>st</sup> Century Victoria. In the final analysis the ‘consent agreement’ may well be another form of dispossession through the native title process.

This paper weighs up what real gains were achieved, and examines the relevance of this judgment to the Yorta Yorta Native Title claim, in the Murray Goulburn region (Yorta Yorta Native Title Claim, 1994-2002). It challenges the Victorian Government’s shameful legacy of Indigenous land injustice and its lack of political will to deal with the matter in a fair and just manner. Its key focus is to:

- assess the gains made from the consent agreement determination in the context of the amount of land that has been returned to the original and oldest land owners in 21<sup>st</sup> Century Victoria on the basis of prior occupation and ownership rights;
- evaluate the Federal Court consent determination, 13 December, 2005 and its [relationship to the Yorta Yorta decision] (suggest ‘relationship to the Yorta Yorta decision’); and
- highlight the need for a more efficient land claims process that will provide Victorian Indigenous peoples with substantive land justice and economic security for the future.

The nature of the consent agreement reached between the claimants and the respondents, and the underlying reasoning in the orders made by Justice Merkel of the Federal Court, 13 December, 2005 sends a message stick to the Bracks’ Government, and a spear to the heart of Olney J’s decision in *Yorta Yorta Community v The State of Victoria & Ors* [1998]. With a deep sense of irony however, the agreement also returns a boomerang to Justice Merkel’s judgment, in which he rejects the way euphemistic phrases like the ‘tide of history’ have been used to justify dispossession in the southern regions of Australia.

Merkel J found himself determining a question first put before him in 2001, which he then declined to answer due to claims by others of his ‘bias.’ The ‘tide of history’ idea was construed from *Mabo, 1992* to deny land justice in the Yorta Yorta Native Title case, 1998 (see *Mabo v The State of Queensland [No 2]* (1992) 175 CLR 1 at 60 per Brennan J). Merkel J’s recognition of the underlying and causative effects of land conflict, upon which this ‘tide’ has been constructed is praiseworthy, and his acknowledgement of the fact that Aboriginal peoples suffered ‘severe and extensive dispossession, degradation and devastation’, as a consequence of the imposition of British authority during the 19<sup>th</sup> century, is compelling (p.2). The importance that Justice Merkel places on the principle that traditional laws are not ‘fixed and unchanging’ (pp.11-12), and the need to be cautious about the reliability of historical sources in native title cases is also relevant to the Yorta Yorta.

Justice Merkel provides a clear eyed summary of the underlying history of the land wars (*Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples v State of Victoria* [2005] FCA 1795 (13 December 2005) p.2) which is a potent reminder of the continued legacy of land theft and consequent neglect by past and present Governments. From an Indigenous perspective, it may be argued that the dispossession of Indigenous territories followed three distinct phases. First was wholesale, forceful dispossession under the imported legal fiction of *terra nullius*. Second was dispossession of most of the reserve lands that were allocated for Indigenous use under the segregation and control policies of the mid 19<sup>th</sup> and early 20<sup>th</sup> centuries. The third, which is happening now, is backdoor dispossession through euphemistic phrases like ‘the tide of history’ and through the native title process, by which Indigenous entitlements to own and have control of land and resources have been reduced to the status of “permissive occupancy”.


The path to land justice in Victoria has been a hard and hollow one and the returns have been miniscule. In 2006 the status of Indigenous land justice in Victoria can be indicated with a dot on the map. As indicated in the table below, Indigenous Victorians have been returned the derisory amount of less than one percent of their ancestral lands.

This amount does not include the ‘consent agreement’ reached by the claimants in the Mallee-Wimmera region (2005) which the court states is ‘not a grant of native title’ (p.8). The agreement offers no ownership or exclusive rights over land and waters and provides for no more say over its management than that accorded to settler interests. The claimants’ tradition-based rights to occupy, possess and enjoy the two percent of their claim area along the Wimmera River have been normalized to the extent that their inherent rights to continue to camp, fish, and enjoy the land and waters as their ancestors have done, are treated the same as those of other Victorians. In exercising these rights they also will be required to comply with the imported Anglo laws and regulations that govern these activities. Should there be any inconsistency between the native title rights of the claimants and the rights of other license holders, the latter’s rights prevail (*Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples v State of Victoria* [2005] FCA 1795, 2005: 10-15). The question of whether this is land justice or continued dispossession by stealth is one of critical importance.

The nature of the title and the rights to land that have been returned to Victoria’s original owners by way of Government grants, transfers and the purchase of land on the open market is worth noting (see table below). Most of the land has been returned under inalienable freehold title and includes some small areas that contained Aboriginal cemeteries. Some of the land was granted and or purchased on the condition that it used for Aboriginal cultural purposes, and in all of the lands acquired, the Crown retains certain rights and interests including the right of veto over mining.

The lack of progress towards land justice in Victoria made by the current Brack's Labor government offers little joy to Indigenous Victorians, particularly as it follows the expressions of regret made by the last two outgoing Labor premiers, John Cain and Joan Kirner, during the height of the reconciliation process. Regrets for not being able to do enough for Indigenous Victorians during their period of office are fine sentiments, but their failure to deliver is inevitably our loss. Feelings of regret may well be exacerbated for the Brack's government which unlike its predecessors has the numbers and the power to deliver land justice to Indigenous Victorians on the basis of fair and just principles. This should include the allocation of substantive capital to allow for land and cultural

### STATUS OF INDIGENOUS LAND JUSTICE IN VICTORIA, 2006

State	% of Land Held	Nature of Title	Land Rights Legislation-Comm/State
VIC	0.014	Inalienable freehold	<i>Aboriginal Land Act 1970</i> (Lake Tyers-Framlingham) (Vic) <i>Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987</i> (Cwth) <i>Aboriginal Land Fund Commission 1974</i> (Cwth)
		Freehold subject to conditions that land be used for community cultural and burial purposes.	<i>Aboriginal Land Rights (Aborigines Advancement League Watts St Northcote) Act 1982</i> (Vic) <i>Aboriginal Land (Northcote Land) Act 1989</i> (Vic) <i>Aboriginal Land Act 1991</i> (Vic) (return of cemeteries at Coranderrk, Ebenezer, Ramhayuck <i>Aboriginal Land (Manatunga Land) Act 1992</i> (Vic) Transfer of Land at Healesville by Commonwealth and purchase of land at Coranderrk by Indigenous Land Fund, 1998.

**Note: There have been some additional land purchases and hand backs since 1998, but the amount of land held as freehold by traditional owners is STILL less than a half of one percent - a dot on the map-see Strategy for Aboriginal Managed Lands in Victoria, 24th September 2003.**  
<http://home.vicnet.net.au/~samliv/>

development. Added to this rather embarrassing track record is the fact that Victoria is the only state apart from Western Australia that has not introduced a formal state-wide land claims process for Indigenous claimants. All other states and territories including Tasmania, (*Aboriginal Lands Act 1995* (Tas)), have introduced land claims processes that allow Indigenous claimants to achieve some degree of land justice on the basis of traditional and historic connections and on the basis of the need for land. The hand back of Cape Barron Island and Clark Island, to Traditional Owners in Tasmania is an example of what can be achieved through a state-based land claims process.

John Cain's commitments to land justice in the early 1980s had some success but his attempts to introduce a state land claims process (the *Aboriginal Land Claims Bill*, 1983) failed because he did not have the numbers in the upper house - a privilege that the current Government holds. Whether this Government is morally and politically committed to rectifying the legacy of dispossession remains at the front of the 'unfinished business' agenda. The Victorian Minister for Aboriginal Affairs, Gavin Jennings, and the Victorian Attorney-General, Rob Hulls, seem committed to this process. However Minister Jennings' ability to influence land justice issues through his party's 'whole of government' approach to Indigenous issues, has chosen to prioritise changes to existing Aboriginal cultural heritage legislation (*Aboriginal Affairs Victoria: Aboriginal Heritage Bill Exposure Draft*, 2005).

The exposure cultural heritage draft legislation, and its attempt to undermine the rights of ownership and control of cultural heritage by Indigenous Victorians, has already met with strong opposition from Traditional Owner groups (*Australians for Native Title and Reconciliation: Say NO to the Cultural Heritage*, 2005). Minister Jennings' ability to

achieve greater positive social and economic outcomes for Indigenous Victorians is further exemplified in a radio interview in which he said that ‘he is prepared to roll up his sleeves and get a bit of dirt on his hands’ (Interview 3CR Radio, 2 August, 2005). An obvious step towards commitments like these becoming political realities would be to set up a land claims process that would allow for a lot more dirt than that which has currently been returned to Victorians traditional owners, and not to take away and or diminish any of those hard fought reforms to Aboriginal Cultural Heritage Legislation that Kooris achieved in the 1980’s. Rob Hulls goes much further by acknowledging the legacy of dispossession. In his talk at the announcement of the Wimmera determination, December 2005, Hulls admitted that:

*We are complicit in this atrocity, unless we can return autonomy and integrity to our relationships and reunite grieving custodians with the home lands they so love* (Sydney Morning Herald, 9 January 2006).

Fine sentiments again, but matching the rhetoric with the political action required to rectify complicity and to alleviate feelings of grief are the challenges ahead. Reuniting grieving custodians with their homelands through fair and just measures, rather than opposing claims, as the Victorian Government chose to do in the Yorta Yorta case, is the key to the integrity of our relationship with the Government.

Justice Merkel's findings in *Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples v State of Victoria* [2005] FCA 1795 (13 December 2005) are revealing. A sense of irony emerges particularly when one reflects on the experience of the Yorta Yorta people, and our attempts to seek land justice through the native title process. The first issue that quickly comes to mind is Justice Merkel’s decision to stand down from the full bench of the Federal Court hearing of the Yorta Yorta appeal, 2001. The appeal was against Justice Olney’s shocking decision of December, 1998, which found that our native title rights had been washed away by euphemistic phrases like the ‘tide of history’. In reaching his decision that our native title rights did not exist, Justice Olney relied almost totally on the memoirs of a European pastoralist, written 40 years after his contact with Yorta Yorta ancestors, to the exclusion of the majority of oral knowledge presented by the Yorta Yorta.

Justice Merkel stood down from the full bench of the Federal Court appeal hearing after counsel for Victoria had claimed that his former role as a trustee with the Koori Heritage Trust meant he could be perceived as biased (*Age*, 18 August 1999, p 8, cites the Victorian Solicitor General’s description of the Koori Heritage Trust as trying to preserve the “living culture” of Aborigines in south-eastern Australia). Why such involvement would prevent a judge from respecting the special purpose of the Native Title Act, and why the same degree of scrutiny for perceived bias was not applied to other judges, was never raised. Nor is it clear why this perceived bias was seen as an impediment in the Yorta Yorta and not the Wotjobaluk case. In my view, Justice Merkel's enlightenment in Indigenous history and culture, and his commitment to its survival, is no barrier to the judge’s ability to administer the law in accordance with the legal framework of *Mabo, 1992* and the *Native Title Act, 1993*. It has always been my personal belief that if Justice Merkel had have hung in there we stood a good chance of getting across the line at the Full Bench of the Federal Court Appeal, 2001. Evidence for this view is found in Chief Justice Black’s dissenting judgment in the Yorta Yorta appeal, where he quoted Merkel’s opinion in another native

title case, that Olney's approach partly subverted the aim of the *Native Title Act 1993* (*Commonwealth v Yarmirr* [2001] HCA 184 ALR 113 at p158-59 per Justice McHugh, summarizing Merkel's opinion in that case about Olney's approach).

One vital issue that Merkel was well aware of was the need to watch out for inherent biases in historical sources, particularly when judging the value of oral and written evidence. He thought it "desirable for the courts to consider" whether historical sources "were not invalidated by a particular preconception, bias or prejudice of the author". He said judges should be careful not to use such sources to deny the validity of oral history. (Merkel in *Yarmirr*, quoted by Chief Justice Black, *Yorta Yorta v Victoria* (2001) 110 FCR 244 p 262). This is another barb that goes straight to Olney, in the way that he relied almost exclusively on the memoirs of a European land seeker to determine the existence of native title laws and customs in the Yorta Yorta case, to the exclusion of the majority of evidence presented. The Yorta Yorta case generated nearly 12,000 pages of transcript which included 6,247 pages (54%) of Yorta Yorta oral knowledge (Atkinson, 2000:10). The question of whether a different Federal Court outcome at the appeal might have produced a different outcome from the High Court, 2002 or whether we should have avoided going through the Native Title process and gone directly to the High Court following the Mabo decision in 1992 remains academic, but the opportunity to deal with the matters raised at the full bench was certainly there in the waiting.

The other revelation that quickly emerges from the Wotjobaluk case is that that the native title agreement was reached through mediation rather than adversarial litigation. The Yorta Yorta attempted mediation (1994-95) but the opposing parties, on the advice of their legal counsel, chose to close ranks and were unwilling to negotiate a mediated outcome. It is interesting to note that some of most recalcitrant of these lawyers have continued to enjoy the monetary benefits of the native title gravy train, and represented parties to the Wimmera claimant's mediated outcome (*Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples v State of Victoria* [2005] FCA 1795, 2005, pp. 8-9).

The spear that was driven so deep into the wounds of the Yorta Yorta returns to its sender, and ironically the boomerang comes back to revisit Justice Merkel who may often share the dissatisfaction that we do, in that the opportunity to deal with euphemistic phrases like 'the tide of history', and the inherent prejudices in historic sources, was at the Yorta Yorta appeal, 2001 Full Federal Court Decision (*Members of the Yorta Yorta Aboriginal Community v State of Victoria* (Including Corrigendum dated 21 March 21 2001) [2001] FCA 45 (8 February 2001).

Looking back and with the advantage of recent judgments before us, one can say that land justice for my people was there in the waiting, but was whisked away by political and legal deception. That the course of justice was perverted in our case is a fair call.

While the notion of 'the tide of history' has been rejected in the Wotjobaluk case, the determination has had the effect of erasing their full and exclusive entitlements to the ownership and control of their ancestral lands. Backdoor dispossession by way of the native title process may well be the final outcome. That such rights could have been achieved through a negotiated outcome with the Government in which the claimants' right to occupy and enjoy their ancestral lands would have been fully restored, rather than

being subjected to the costly and draining native title process, is another significant political question that demand urgent attention.

On a final note, it is reasonable to suggest that Justice Merkel's rejection of antiquated perceptions of native title, invites comfort from within the legal, political and academic community. The Yorta Yorta struggle for land justice has been a major case study within academic, legal, political and community circles. In my role as a lecturer I have had the pleasure of presenting the Yorta Yorta case to multitudes of Australian and International students, many of whom are studying law. There are literally thousands of students who have had the opportunity to analyse and to critically assess the reasoning behind the Olney Judgment, 1998. In their analysis of the case materials, students have virtually picked up 'the tide of history idea', turned it around and unceremoniously dumped it back in Justice Olney's lap. Indeed it has been difficult to find sufficient grounds upon which students can take a pro-Olney view, and it would be correct to say that most of the general legal and political analysis of the case has pointed to the fact that Olney J. got it fundamentally wrong. Comforting as these critiques of Olney have been, the reality is that while Merkel J. attempted to drown the tide idea in the Mallee-Wimmera region, it is still floating in the Yorta Yorta case. That there may be avenues for redress in light of the Merkel J. determination are legal technical questions that require further examination.

From this analysis it is obvious that the process of gaining land justice can be better advanced through a more efficient and effective land claims process that delivers equality in land on the basis of fair and just principles. These are the moral and political issues that confront the Government and Indigenous claimants as we approach the Commonwealth Games, 2006.

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Native Title Research Unit  
Australian Institute of Aboriginal and Torres Strait Islander Studies  
Lawson Cres, Acton Peninsula ACT  
GPO Box 553 Canberra ACT 2601  
Telephone 02 6246 1161      Facsimile 02 6249 7714  
Email [ntru@aiatsis.gov.au](mailto:ntru@aiatsis.gov.au), website <http://ntru.aiatsis.gov.au/>

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