An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: *Yorta Yorta*

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The High Court in Yorta Yorta *denied a claim for native title because the traditional society had ceased to exist. In doing so the Court held that to establish such a claim there must be a continued acknowledgement of traditional laws and observance of traditional customs. That requirement is contrary to the principles of recognition underlying native title. The problems it poses for claimants are compounded by the imposition of the onus of proof with respect to the requirement. Overall the Court's decision renders the establishment of native title almost impossible in the 'settled' regions of Australia, and does so on a basis that is contrary to universally accepted principles.*

EUROPEAN settlement of Australia entailed a massive disturbance of and impact on the way of life of indigenous people, particularly in the South and coastal regions. Proof of native title in those regions was always likely to be difficult. The case of *Yorta Yorta Aboriginal Community v Victoria*[1] has made clear how very difficult. The case emphasised a particular consequence of European settlement – the 'destruction of Aboriginal society'.[2] But the High Court also made clear that, in order to establish a claim to native title, there must be continuous acknowledgement

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1. [2002] HCA 58 (12 Dec 2002).
2. See the landmark account of CD Rowley *The Destruction of Aboriginal Society* (Melbourne: Penguin Books, 1972) 1.

and observance of traditional laws and customs from the acquisition of British sovereignty to the present. This casenote seeks to examine the nature of the claim and the action, the approach at trial and in the Full Federal Court, and the reasoning of the High Court. It is suggested that the requirement of continuous acknowledgement and observance of traditional laws and customs is unwarranted in principle and a denial of equality. The problems of native title claimants are compounded by the reluctance to make any allowance for the considerable problems of proof thereby imposed.

THE CLAIM AND THE ACTION

The claim was made to public lands and waters in large parts of northern Victoria and southern New South Wales lying along the Murray River. The area is in the settled southern part of Australia and contains several large towns. By 1860 land on both sides of the river had been taken for pastoral purposes.

The claim was made firstly on the basis that the claimants had been continuously physically present on, or had occupied, used and enjoyed, the claimed areas '[from] 1788 until the present day'. Alternatively, the claim was made on the basis that the claimants had a continuing traditional connection with the areas claimed, demonstrated by a continuing system of custom and tradition incorporating a traditional relationship to the land.[3] Crucial to the case was the nature and degree of continuity required.

In February 1994 an application was made to the Registrar of the Native Title Tribunal for a determination of native title. The application was accepted in May 1994 and in May 1995 it was referred to the Federal Court.

PROBLEMS OF PROOF AND CONTINUITY AT TRIAL

The action was tried between October 1996 and November 1998 by Olney J. His Honour delivered reasons making a determination that native title did not exist on 18 December 1998.

The problems of proof

Olney J made no allowance for the particular problems of proof faced by the claimants, observing that there was no 'warrant within the Native Title Act for the Court to play the role of social engineer, righting the wrongs of past centuries'.[4] He acknowledged the difficulties of proof where reliance must be placed on that tradition

3. *Yorta Yorta* above n 1, Gleeson CJ, Gummow & Hayne JJ para 19.
4. *Yorta Yorta v Victoria* [1998] FCA 1606, para 17.

but discounted the evidence of the claimants based on oral tradition.[5] He preferred to rely on the writings of a squatter named Curr: '[L]ess weight should be accorded to [evidence based on oral tradition] than to the information recorded by [the squatter]'.[6]

Moreover, Olney J was not prepared to draw any inferences favourable to the claimants despite the obvious difficulties of bearing the onus of proving events that occurred over 150 years ago. He refused, for example, to infer that an Aboriginal person born in the claim area in the 1840s had any connection with the Aboriginal inhabitants of the area in 1788.[7] He commented that 'by that time European settlement in the area was well established'.[8]

Failure to prove continous connection

Olney J appeared to hold that the claimants had to prove maintenance of their connection with the land from settlement to the present day in accordance with the traditional laws and customs as they were in 1788.[9] He concluded that they had failed to prove any such present connection; they had ceased to occupy the land 'in the sense that the original inhabitants [had] occupied it' and had ceased to observe their traditional laws and customs by 1881.[10]

Olney J emphasised the disturbance of Aboriginal people by European settlement and the suppression of languages and tribal customs.[11] He stated that the required acknowledgement and observance of traditional laws and customs was not satisfied by treating evidence of past Aboriginal occupation as sacred and by practising conservation in fishing. He observed that the squatter Curr did not refer to conservation as an aspect of traditional laws and customs. He emphasised the failure to conduct initiation or other ceremonial activities indicative of spiritual attachment to the land. He concluded that 'the tide of history has washed away any real acknowledgement of their traditional laws and any real observance of their traditional customs'.[12]

THE FULL FEDERAL COURT DISMISSES THE APPEAL

On appeal the claimants argued that Olney J had adopted a 'frozen in time' approach which did not allow for adaptation and change in traditional laws and

5. Ibid, paras 21, 24.
6. Ibid, para 106.
7. Ibid, para 98; see also paras 102-103.
8. Ibid.
9. Ibid, paras 105, 106, 109; see also Full Federal Court, paras 178-182.
10. Ibid, para 121.
11. Ibid, para 117.
12. Ibid, paras 122,123,127,129.

customs. The majority, Branson and Katz JJ, considered it uncertain whether the trial judge had adopted that approach, but declared that if he did he was 'wrong to do so'.[13] However, they refused to disturb Olney J's incidental finding that the indigenous community had lost its character as a traditional community on account of its separation from the claimed lands following European settlement and the drastic reduction in its numbers caused by disease and conflict.[14] They refused to disturb that conclusion, emphasising the long and complex hearing and the quantity of evidence, having regard to which there was a need for appellate caution. [15]

Black CJ, dissenting, considered that the approach adopted by Olney J was 'too restrictive' in failing to allow for traditional laws and customs to adapt and evolve.[16] Moreover, he considered that the trial judge had failed to assess properly the evidence based on oral tradition,[17] and emphasised the need for 'strong foundations' for a finding that the 'acknowledgement of traditional laws and customs ceased long ago'. His Honour would have sent the matter back to the trial court for a further hearing.

THE HIGH COURT DISMISSES THE APPEAL

The decision of the High Court was handed down on 12 December 2002. A 5:2 majority dismissed the appeal and upheld the determination of the trial judge that native title did not exist. The majority was composed of Gleeson CJ, Gummow and Hayne JJ, who wrote a joint judgment; McHugh J, who wrote a short judgment agreeing in the main with the joint judgment; and Callinan J. Gaudron and Kirby JJ wrote a joint dissenting judgment.

Rejection of continuing Aboriginal sovereignty and laws

The joint majority judgment began unexceptionally enough by establishing the framework in which consideration of traditional laws and customs should take place. In *Mabo (No 2)*, Brennan J had declared that '[n]ative title has its origin in ... the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants'.[18] Like language was used in the definition of native title in section 223 (1) (a) of the Native Title Act 1993 (Cth). The declaration in *Mabo (No 2)*

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13. (2001)110 FCR 244, Branson & Katz JJ para 182. In a peculiar observation the joint judgment in the High Court observed that 'all members of the Federal Court concluded that the primary judge had probably not applied a "frozen in time approach"': para 26.
14. Ibid, para 194; see also para 191.
15. Ibid, paras 202-205.
16. Ibid, para 75.
17. Ibid, para 84.
18. (1992) 175 CLR 1, Brennan J 58.

had led to suggestions of continuing Aboriginal sovereignty and laws. In *Yorta Yorta*, however, the High Court totally rejected any suggestion of continuing Aboriginal sovereignty and declared:

> What the assertion of sovereignty by the British Crown necessarily entailed was that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty. To hold otherwise would be to deny the acquisition of sovereignty. [19]

It should be clear that the relevance of traditional laws and customs is to the nature of the connection which native title holders have to their traditional lands *at the date of acquisition of British sovereignty*. The common law recognises and gives effect to that relationship, not to the traditional laws and customs themselves. Acknowledgement and observance of particular traditional laws and customs is not relevant *thereafter*. The majority in *Yorta Yorta* did not agree.

Traditional laws and customs must have their origins prior to British sovereignty

The majority joint judgment held that native title was the remnant of the rights and interests recognised under the body of laws and customs (the legal system) which existed prior to British sovereignty.[20] It declared:

> The only rights or interests in relation to land or waters, originating otherwise than in the new sovereign order, which will be recognised after the assertion of that new sovereignty are those that find their origin in pre-sovereignty law and custom. [21]

The requirement of 'tradition' in section 223(1)(a) of the Native Title Act 1993 was accordingly interpreted to entail the understanding that, 'the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown'.[22]

Two requirements: continuity of a pre-British sovereign society *and* acknowledgment and observance of traditional laws and customs

The society must continue to exist or the communal connection to the land will be severed. This requirement reflects the principle established by Toohey J in *Mabo*

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19. *Yorta Yorta* above n 1, Gleeson CJ, Gummow & Hayne JJ para 44.
20. Ibid, Gleeson CJ, Gummow & Hayne JJ paras 37-38.
21. Ibid, Gleeson CJ, Gummow & Hayne JJ para 44.
22. Ibid, Gleeson CJ, Gummow & Hayne JJ para 46.

(No 2) that connection with the land 'would be insufficient to establish title if it was coincidental only or truly random, having no connection with or meaning in relation to a society's economic, cultural or religious life'.[23]

However, in *Yorta Yorta,* the joint judgment explained the requirement as arising from the need for traditional laws and customs to have 'continued existence and vitality'.[24] Further, if the society out of which the body of laws and customs arises ceases to exist as a group which acknowledges and observes those laws and customs, those laws and customs cease to have continued existence and vitality. When the society whose laws or customs existed at sovereignty ceases to exist, the rights and interests in land to which these laws and customs gave rise also cease to exist.[25]

The majority joint judgment emphasised the need to focus on (i) what the traditional laws and customs were prior to British sovereignty, and (ii) the *continuous* observance of those laws and customs:

> It will be necessary to inquire about the relationship between the laws and customs now acknowledged and observed, and those that were acknowledged and observed before sovereignty, and to do so by considering whether the laws and customs can be said to be the laws and customs of the society whose laws and customs are properly described as traditional laws and customs.[26]

Further:

> It must be shown that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout that period as a body united by its acknowledgment and observance of the laws and customs'.[27]

This approach is consistent with the oft-quoted language of Brennan J in *Mabo (No 2)*. His Honour demanded that acknowledgement of traditional laws and observance of traditional customs be continued to the present:

23. *Mabo (No 2)* above n 18, 188.
24. Gaudron and Kirby JJ likewise emphasised the need for the continuity of the society or community: 'Continuity of community is also a matter that bears directly on the question whether laws and customs are properly described as traditional. In *Mabo (No 2)*, Toohey J pointed out that a society must be "sufficiently organised to create and sustain rights and duties" for there to be a system of land utilisation determined by that society': *Yorta* Yorta above n 1, para 116. See also Callinan J para 186. Bearing in mind that, 'under s 223 (1)(a), it is necessary that traditional laws are presently acknowledged and traditional customs presently observed': ibid, Gaudron & Kirby JJ para 101.
25. *Yorta Yorta* above n 1, paras 50, 53; and see Gleeson CJ, Gummow & Hayne JJ paras 47, 87.
26. Ibid, Gleeson CJ, Gummow & Hayne JJ para 56.
27. Ibid, Gleeson CJ, Gummow & Hayne JJ para 89.

> When the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.[28]

> Native title ... is extinguished if the clan or group, by ceasing to acknowledge those laws, and (so far as practicable) observe those customs, loses its connection with the land, or on the death of the last of the members of the group or clan.[29]

In the writer's view, continued acknowledgement of traditional laws and observance of traditional customs after British settlement should be relevant only to the demonstration of the continuance of the society[30] and to the regulation of relationships between members of the society. Under universal principles regarding the acquisition of territory, existing rights and relationships are recognised as a fact under the law of the acquiring state.[31] After the acquisition of sovereignty there is no 'parallel law-making system'.[32] The native title relationship under such an approach would be recognised and given 'full respect' under the law of the acquiring state. The requirement represents a refusal to give effect to the relationship recognised at the date of acquisition of sovereignty, contrary to principles applied to other interests.

The Native Title Act 1993 refers to possession of traditional laws acknowledged and traditional customs observed in the definition of native title in section 223, but it does not explicitly require present-day acknowledgement and observance of particular traditional laws and customs. That, however, is the interpretation which has been adopted in *Yorta Yorta*. The High Court upheld the requirement of such maintenance of connection under the Native Title Act 1993, requiring present-day acknowledgement and observance of particular traditional laws and customs.[33] The requirement is wholly unwarranted by the principles of recognition of existing rights at common law or international law. The error is compounded by the imposition of the onus of proof on claimants with respect to the requirement.

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28. *Mabo (No 2)* above n 18, Brennan J 60.
29. Ibid, Brennan J 70.
30. The joint judgment emphasised the inextricable link between a society and its laws and customs: 'Laws and customs do not exist in a vacuum. They are, in Professor Julius Stone's words, "socially derivative and non-autonomous"': ibid, Gleeson CJ, Gummow and Hayne JJ paras 49, 55. As Professor Honoré has pointed out, it is axiomatic that 'all laws are laws of a society or group'. Some of these issues were considered in *Milirrpum v Nabalco Pty Ltd* where there appears to have been detailed evidence about the social organisation of the Aboriginal peoples concerned. Some were touched on by Toohey J in *Mabo (No 2)* where his Honour referred to North American decisions about similar questions.'
31. DP O'Connell *Law of State Succession* (Cambridge: CUP, 1956) 101–103. DP O'Connell *International Law* 2nd edn (London: Stevens & Co, 1970) 377-381.
32. *Yorta Yorta* above n 1, Gleeson CJ, Gummow & Hayne JJ para 44.
33. Ibid, Gleeson CJ, Gummow and Hayne JJ paras 89-90.

Abandonment and substantial maintenance: onus of proof

The High Court did not accept that upon proof of connection to the claimed land prior to British sovereignty a presumption in favour of continuity should operate. Accordingly, the majority[34] rejected the concept of abandonment, whereby the onus would have been upon gainsayers of native title to show abandonment, including an intention to abandon:

> Describing the consequences of interruption in acknowledgment and observance of traditional laws and customs as 'abandonment' or 'expiry' of native title is apt to mislead. 'Abandonment' might be understood as suggesting that there has been some conscious decision to abandon the old ways, or to give up rights and interests in relation to the land or waters. Demonstrating continuous acknowledgment and observance of traditional laws and customs would, of course, negate any suggestion of conscious decision to abandon rights or interests. But the inquiry about continuity of acknowledgment and observance does not require consideration of why, if acknowledgment and observance stopped, that happened. That is, continuity of acknowledgment and observance is a condition for establishing native title.[35]

In other jurisdictions once native title is proved to have existed at the date of acquisition of sovereignty, there is a presumption that it continues to exist thereafter. In *Amodu Tijani v Secretary, Southern Nigeria,* Viscount Haldane declared: 'The original native title right was a communal right, and it must be presumed to have continued to exist unless the contrary is established'.[36]

In *Calder v Attorney-General (British Columbia)*, Hall J cited *Amodu Tijani* with approval and observed: 'Once Aboriginal title is established it is presumed to continue until the contrary is proven'.[37]

The explanation for the onus lying upon the party seeking to assert non-maintenance of traditional laws and customs has both a practical and a principled basis. Practically, the imposition of the onus upon indigenous people to prove maintenance from settlement to the present, in circumstances where they have no written records and 'traditions are largely oral in nature', may 'impose an impossible burden of proof' which would in effect 'render nugatory any right'.[38]

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34. Gaudron and Kirby JJ dissented from the conclusion that substantial maintenance of connection was required under s 223 (1) (a) and (b) provided present acknowledgement and observance of traditional laws and customs was established. They would have referred the matter back for further hearing: 'His Honour's erroneous view that that was required was an error of law affecting the reasoning process which led to the finding that the tide of history ha[d] washed away any real acknowledgement [by the Yorta Yorta people] of their traditional laws and any real observance of their traditional customs': ibid, para 123.
35. Ibid, Gleeson CJ, Gummow and Hayne JJ para 90.
36. [1921] 2 AC 399, 410.
37. (1973) 34 DLR (3d) 145, 208 (SC(Can)).
38. *Simon v R* [1985] 2 SCR 387, 408.

Moreover, the principles of 'full respect' and equality require that native title be presumed to continue just like any other interest. Possession may be considered an analogous interest for this purpose. Once possession is established, it gives rise to a right which is presumed to continue, regardless of whether or not the original party remains in possession. The onus with respect to abandonment is upon the party asserting abandonment.

The onus includes, as with other interests, showing an *intention* to abandon. Consideration of native title in the United States led the Court of Claims to declare that, 'Beyond doubt, abandonment of claimed Indian Territory by the Indians will extinguish Indian title'. However:

> The issue of abandonment is one of intention to relinquish, surrender and unreservedly give up claims to title.... The source from which to arrive at such an intention is the facts and circumstances of the transaction involved. Forcible ejection from the premises or non-user under certain circumstances, as well as lapse of time, are not, standing alone, sufficient to warrant an abandonment.[39]

Adaptation of traditional laws and customs

Adaptation of traditional laws and customs was not considered necessarily fatal by the High Court. In a case such as *Yorta Yorta,* where it had been argued that a change in traditional laws and customs had not been allowed for by the trial judge, the High Court declared that the 'key question is whether the law and custom can still be seen to be traditional law and traditional custom. Is the change or adaptation of such a kind that it can no longer be said that the rights or interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples?'[40] If the adaptation is in accordance with the

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39. *Fort Berthold Indians v United States* 71 Ct Cl 308, 334 (1930); *Quapaw Tribe v United States* 120 F Supp 283, 286 (1954).

40. *Yorta Yorta* above n 1, Gleeson CJ, Gummow & Hayne JJ para 83. Gaudron and Kirby JJ observed that any changes or 'differences should constitute adaptations, alterations, modifications or extensions made in accordance with the shared values or the customs and practices of the people who acknowledge and observe those laws and customs': ibid, 114. Gaudron and Kirby JJ dissented on the ground that the trial judge had failed to consider whether the laws and customs presently acknowledged and observed were adapted by the society, for example, reburial practices:

> His Honour did not consider whether the reburial practices had their origins in the past in that, for example, they had evolved out of earlier practices or constituted an adaptation of earlier laws or customs, with the consequence that they had a sufficient degree of continuity with the past that they could properly be described as traditional for the purposes of s 223(1)(a) of the Act: ibid, para 115.

Callinan J clearly adopted a much narrower view of adaptation and evolution than the remainder of the court. The example he provided suggested a frozen rights approach:

> The extent to which longstanding law and custom may evolve without ceasing to be traditional may raise difficult questions. The matter went uncontested in *Yanner v Eaton* [(1999) 201 CLR 351], although for myself I might have questioned

laws and customs of the ongoing society it should not be denied the characterisation as 'traditional'. It was recognised 'that European settlement has had the most profound effects on Aboriginal societies and that it is, therefore, inevitable that the structures and practices of those societies, and their members, will have undergone great change since European settlement'.[41]

However, a preparedness to allow for adaptation fails to overcome the restrictive effect of the requirement that laws and customs be both particularised *and* be proven to have been acknowledged and observed continuously since sovereignty, without the benefit of any presumption of continuity. *Ward v Western Australia*[42] had demanded proof of particular traditional laws and customs. The combined requirements significantly restrict the possible evolution of native title.

Refusal to upset Olney J's assessment of the evidence

Olney J gave less weight to the evidence based on oral history of the claimants than to the written commentary of a European settler. The High Court refused to upset the assessment of the evidence and made little or no allowance for problems of proof. The majority joint judgment was influenced in part by the reliance the claimants had placed upon the written European commentary:

> The assessment of what is the most reliable evidence about *that* subject was quintessentially a matter for the primary judge who heard the evidence that was given, and questions of whether there could be later modification to the laws and customs identified do not intrude upon it. His assessment of some evidence as more useful or more reliable than other evidence is not shown to have been flawed. The conclusion the primary judge reached did not begin from the impermissible premise that written evidence about a subject is inherently better or more reliable than oral testimony on the same subject.[43]

The decision of the Supreme Court of Canada in *Delgamuukw v British Columbia*[44] affords a stark contrast. That court rejected the trial judge's refusal to give weight to oral histories and 'reluctantly' ordered a new trial. The trial judge had refused to give weight to those histories –

> because they did not accurately convey historical truth, because knowledge about these oral histories was confined to the communities whose histories they were and because those oral histories were insufficiently detailed.[45]

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whether the use of a motor boat powered by mined or processed liquid fuel, and a steel tomahawk, remained in accordance with a traditional law or custom, particularly one of alleged totemic significance: ibid, para 187.

41. *Yorta Yorta* above n 1, Gleeson CJ, Gummow and Hayne JJ para 89.
42. *Western Australia v Ward* [2002] HCA 28 (8 Aug 2002) Gleeson CJ, Gaudron, Gummow & Hayne JJ paras 84, 93.
43. Gleeson CJ, Gummow & Hayne JJ para 163; and see Callinan J para 190.
44. [1998] 1 CNLR 14.
45. Ibid, para 87.

Lamer CJ explained that such an approach would result in oral histories being 'consistently and systematically undervalued'.[46] Oral history must be 'accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consist of historical documents'.[47]

THE GREAT DIFFICULTY OF ESTABLISHING CLAIMS, PARTICULARLY IN THE SOUTH

The claim of the Yorta Yorta community failed because the majority in the High Court refused to disturb the trial judge's finding that the traditional society had ceased to exist and accordingly so had the continued acknowledgement of traditional laws and observance of traditional customs required by section 223(1)(a) of the Native Title Act 1993.

The ruling that a society must continue to exist is in accord with universal principles as to the respect due to existing rights of a society. But the requirement that traditional laws and customs be acknowledged and observed continuously from the acquisition of British sovereignty to the present is not. The refusal to recognise the inherent difficulties of proof and the determination to impose the onus of proof with respect to that continuity on the claimants also fails the dictates of equality.

The High Court was not prepared to disturb the trial judge's assessment of the evidence which favoured written European commentary over that of oral Aboriginal tradition or history. When it was further demanded that the claimants assume the entire onus of proof, without the benefit of any presumption of continuity, the task for them, in an area of intensive European settlement, became almost insurmountable. The decision of the High Court shows a determination not to make allowances for the problems of proof of native title claimants nor to allow any presumption in their favour which fairness might demand. The end result is that native title claimants in remote areas will find proof of native title very difficult, and in the heavily populated South, almost impossible.

The impact of the requirement of continued acknowledgement of traditional laws and observance of traditional customs, above and beyond that required to establish the continuance of the society, and the imposition of the onus to show substantial maintenance of the traditional connection on the claimants, was graphically depicted in late 2002 in *De Rose v South Australia*.[48] The Federal Court rejected a native title claim because of the failure to prove a continuing connection

46. Ibid, para 98.
47. Ibid, para 107.
48. [2002] FCA 1342 (1 Nov 2002) O'Loughlin J.

after 1978. The claimants failed to prove continued acknowledgement of traditional laws and observance of traditional customs, particularly in the form of rituals and ceremonies caring for land. The combined effect of an emphasis on particularising acknowledgement and observance of traditional laws and customs, and the demands of proof that acknowledgement and observance of such laws and customs be maintained to the present, means that most claims will be denied.