**The *Yorta Yorta* Decision**

> How much compensation have we had? How much of our land has been paid for? Not one iota! Again, we state that we are the original owners of the country. We have been ejected and despoiled of our god-given right and our inheritance has been forcibly taken from us.[1]

In 1939, Yorta Yorta man William Cooper outlined the simple injustice of British colonisation. Cooper had protested for many years, seeking to change Australian law to better recognise the rights and interests of First Nations peoples. In 1935, as Secretary of the Australian Aborigines League, Cooper secured the signatures of almost 2,000 Aboriginal people calling for representation in parliament, voting rights, and land rights. In 1938, along with Jack Patten and William Ferguson, he led the first 'Day of Mourning' pursuing citizenship and equality. Cooper's determination and persistence was shared by First Nations peoples across the country who struggled against a legal framework that denied their rights.

***Background***

Aboriginal and Torres Strait Islander peoples have occupied the Australian continent for at least 60,000 years. Organised in distinct political communities, First Nations peoples were bound together by a system of customary law that governed their relationships to each other and to country. When the British arrived and colonised the continent, they ignored the pre-existing systems of law that had directed these societies for tens of thousands of years. In what became known as the legal doctrine of *terra nullius* (land belonging to no one), the British simply ignored the rights and interests of First Nations peoples.

The supposed legal basis for this approach was the 1889 decision of *Cooper v Stuart*. In this case, the Privy Council – then the highest Court for Australia – held that when the British arrived, the Australian continent was 'a tract of territory practically unoccupied, without settled inhabitants or settled law'.[2] This was factually incorrect, but it set in place a legal framework that continued until the 1990s.

***The Mabo decision***

Of course, Aboriginal and Torres Strait Islander peoples contested this position. In petitions, protests and litigation, First Nations peoples fought against the imposed colonial legal system, calling for recognition of their rights to land. However, it was not until 1992 that the High Court was squarely confronted with this issue.

In *Mabo v Queensland (No 2)*, the High Court was asked whether Australian law could recognise the land rights of the people of Mer (Murray Island) in the Torres Strait. The High Court said: yes. The Court rejected the position from *Cooper v Stuart*, holding that the Australian continent was neither empty of people nor of laws, customs and governance. The court rejected the idea that *terra nullius* 'was an appropriate legal foundation for Australia and renounced it as a legal fiction'.[3] It was out of step with both historical fact and basic principles of international law and justice.

The court said that the acquisition of sovereignty by the British did not displace First Nations peoples' land rights. Australian law could recognise native title. However, the Court also placed strict limits on native title. It held that Australian law can validly extinguish First Nations peoples land rights. Doing

---

[1] William Cooper, Yorta Yorta, (1939) cited in Wayne Atkinson, '"Not One Iota" of Land Justice: Reflections on the Yorta Yorta Native Title Claim, 1994-2001' (2001) 5(6) *Indigenous Law Bulletin* 19.
[2] (1889) 14 App Cas 286, 292.
[3] George Williams and Harry Hobbs, *Treaty* (Federation Press, 2nd ed, 2020) 209.

so did not even give rise to compensation at common law. In other words, unlike other property rights, Aboriginal and Torres Strait Islander peoples 'would not be compensated for the loss of their land'.[4]

The Court also set out how native title could be found. First Nations groups would need to satisfy two requirements to have their rights and interests in lands and waters recognised by Australian law.

1. They must continue to acknowledge and observe their traditional laws and customs and therefore maintain the necessary connection to their traditional country; and

2. They must demonstrate that their native title has not been 'extinguished' by law or government action

*Mabo (No 2)* was immediately recognised as momentous. Guugu Yimidhirr lawyer Noel Pearson remarked that the decision 'represents a turning point in the history of Australia since white "settlement"', and 'compels the nation to confront fundamental issues concerning the Indigenous people of Australia, issues which have been largely avoidable to date'.[5]

Prime Minister Paul Keating agreed, noting that *Mabo (No 2)* 'gives Australia a tremendous opportunity to get its relationship with the Aboriginal and Torres Strait Islander people right'.[6] Keating believed that legislation was the best way 'to do justice to the Mabo decision in protecting native title and to ensure workable, certain, land management'.[7] After several months of difficult negotiation, the Commonwealth Parliament passed the *Native Title Act 1993* (Cth).

***The Yorta Yorta Case***

Following the passage of the *Native Title Act*, several Aboriginal and Torres Strait Islander groups lodged claims, seeking recognition and protection of their rights and interests in land. One of the first claims across the nation was made by the Yorta Yorta people in February 1994. The Yorta Yorta are an Aboriginal Nation whose traditional land extends across north-eastern Victoria and southern New South Wales, around the junction of the Murray and Goulburn rivers. They sought native title over 1,840 square kilometres of their traditional lands. As Yorta Yorta country has been heavily colonised by non-Indigenous people, the claim was seen as a test cast 'to show the likely success of native title applications in such areas of Australia'.[8]

In 1998, the Federal Court dismissed their claim. Justice Howard Olney ruled that the Yorta Yorta did not maintain the necessary connection to their traditional country. In words that struck at the heart of the Yorta Yorta and exposed the limits of native title, Justice Olney ruled that the 'tide of history' had 'washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs'.[9]

Justice Olney's reasoning and language have been criticised. In reaching his decision, the judge heavily relied on the writings of Edward Curr, a squatter who recorded his interactions with Yorta Yorta people in the 1840s. Justice Olney found Curr's recollections the 'most credible source of information concerning the traditional laws and customs of the area'.[10] In contrast, he considered that

---

[4] George Williams and Harry Hobbs, *Treaty* (Federation Press, 2nd ed, 2020) 210.
[5] Noel Pearson, '204 Years of Invisible Title' in Margaret Stephenson and Suri Ratnapala (eds), *Mabo: A Judicial Revolution: The Aboriginal Land Rights Decision and its Impact on Australian Law* (University of Queensland Press, 1993) 75, 89
[6] John Laws, Interview with Paul Keating, Prime Minister of Australia (Radio Interview, 17 June 1993) <http://pmtranscripts.dpmc.gov.au/release/transcript-8895>.
[7] Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2878 (Paul Keating).
[8] 'Yorta Yorta Lose Native Title Case', *The World Today* (ABC Radio National, 12 December 2002) <https://www.abc.net.au/worldtoday/stories/s746029.htm>.
[9] *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 [129].
[10] *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 [106].

'less weight' should be accorded to Yorta Yorta oral testimony.[11] The Yorta Yorta had sought to explain that while their traditions had developed and evolved over the years – in response to European settlement – they had continuously observed their laws and culture since Curr's arrival. Justice Olney ruled that because contemporary Yorta Yorta traditions and culture did not conform with the images described by Curr, the necessary connection had been lost.[12]

The metaphor used by Justice Olney was also heavily criticised. The Yorta Yorta were not able to demonstrate ongoing connection to their country because of some natural and impersonal phenomenon. The very real, very personal actions of British colonisation, including murder, massacre, dispossession, and family break-up, prevented Yorta Yorta people from physically occupying and possessing their country. It was not the tide of history but the concerted actions of squatters, colonists and governments.

It is no surprise the Yorta Yorta were outraged. Monica Morgan, the Yorta Yorta group coordinator responded:

> Our mob knew we were taking a chance trusting the system of the white man…but this is like an annihilation of our culture.[13]

They were nonetheless not discouraged. The Yorta Yorta appealed to the Full Court of the Federal Court on the grounds that Justice Olney failed to recognise that traditional laws and customs can adapt to changed circumstances. They argued that the judge adopted a 'frozen in time' approach that required contemporary First Nations groups to emulate a model 'Aborigine standing on the hill with a spear against the sunset'.[14] The Court found errors in Justice Olney's reasoning, but by majority upheld his decision and dismissed the appeal.

The case was then taken to the High Court of Australia. In December 2002, the Yorta Yorta lost once more in a 5 to 2 majority ruling. The court imposed higher legal thresholds that make it far harder for First Nations groups to prove that they have maintained a 'traditional' connection to the land and thus that they possess native title. The majority held that the 'traditional laws and customs' recognised by native title must have been in existence prior to the acquisition of British sovereignty, and that the society that generated those laws and customs must have continued to exist and continued to observe those laws and customs since the assertion of British sovereignty.[15] If the society no longer continues to exist – perhaps because of dispossession, massacre or other rupture caused by colonisation – then native title is lost.

Justices Mary Gaudron and Michael Kirby dissented. In their view, 'traditional' connection to country does not need to be physical and neither does it require continuing occupancy. Traditional connection can be maintained through spiritual connection.[16] They held further that whether a community continues to exist and continues to observe their traditional laws and customs is simply whether since the British assertion of sovereignty 'there have been persons who have identified themselves and each other as members of the community'.[17] This dissent recognised the challenges that First Nations peoples in the southeast of Australia would face in obtaining native title.

***The Limits of the Native Title Act***

---

[11] *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 [106].
[12] See also Samuel Furphy, *Edward Curr and the Tide of History* (ANU Press, 2013).
[13] 'Yorta People Vow to Fight On', *The Age*, 19 December 1998.
[14] Transcript of Proceedings, *Members of the Yorta Yorta v State of Victoria* (Full Court of the Federal Court, VG34 of 1999, Ron Castan QC, 19 August 1999).
[15] *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2002] HCA 58 [43]-[57].
[16] *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2002] HCA 58 [104].
[17] *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2002] HCA 58 [117].

The Yorta Yorta decision exposed the limits of *Mabo (No 2)* and the *Native Title Act*. Senator Aden Ridgeway, a Gumbaynggir man and the second Aboriginal person to serve in the Australian Senate, described the decision as 'terra nullius by attrition'.[18] For areas of the continent most intensively colonised, the decision made it clear that native title would likely be extinguished. First Nations most in need of land justice would find little through native title.

The case thus spurred the development of broader approaches to land reform, particularly in Victoria. In 2010, the Victorian Parliament passed the *Traditional Owner Settlement Act*. Designed 'to advance reconciliation and promote good relations' between the state and Indigenous Australians,[19] the Act enables Victorian traditional owners to pursue a negotiated agreement directly with the state government outside the native title determination process. In 2013, the first settlement negotiated between the Dja Dja Wurrung and the state government commenced.

Yorta Yorta were outraged with the decision, but it only strengthened their resolve. In the aftermath of the High Court judgment, the Yorta Yorta sought to take their case to the United Nations. They also continued to seek a negotiated settlement with the Victorian government. In May 2004, an agreement was reached in relation to cultural heritage and environmental management.[20]

Today, the Yorta Yorta continue to assert their authority over their country. As of April 2022, they have chosen not to take part in the Victorian treaty process. In a 2019 press release, the Yorta Yorta Council of Elders described the treaty process as a 'trip wire' and a 'pathway to assimilation'. The Council explained that only the Commonwealth government has the authority to negotiate a treaty.[21] In the words of William Cooper, the Yorta Yorta continue to seek recognition that they are and remain the original owners of the country.

---

[18] Aden Ridgeway, 'Terra Nullius by Attrition', *Koori Mail*, 15 January 2002, 15 <https://waynera.files.wordpress.com/2010/10/terranulliusby-attrition.pdf>.
[19] *Traditional Owner Settlement Act 2010* (Vic) s 1.
[20] Henry Atkinson, 'Yorta Yorta Co-operative Land Management Agreement: Impact on the Yorta Yorta Nation' (2004) 6(5) *Indigenous Law Bulletin* 23.
[21] Chris Walker, 'Trick or Treaty?' (Press Release, 25 June 2019) <https://yynac.com.au/press-release-trick-or-treaty/>.