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MEMBERS OF THE YORTA YORTA ABORIGINAL COMMUNITY v VICTORIA (2002) 214 CLR 422

Commentary: *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422

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Social, political, and legal context

The 1992 decision in *Mabo v Queensland (No 2)*[1] ('*Mabo*') was unarguably a major turning point in Australia's legal and cultural maturation. A majority of the High Court belatedly revisited the old orthodoxy that the Crown's title was 'absolute' and the underlying fiction that Australia was 'practically unoccupied' at the time of British assertion of sovereignty. Native title was held to be capable of surviving as a burden upon the Crown's acquired 'radical title'. Accordingly, beyond certain lands that had been the subject of specific dealings, the Meriam people of the Torres Strait were 'entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands'.[2]

Yet there would be uncertainty in the application of these principles to mainland Australia—the product of subtle differences within and between the majority judgments, the uncertain scope of key terms underpinning the new principles, and the uniqueness of the facts in *Mabo*. Most importantly for present purposes, and critical to the progress of Australia's legal renaissance, questions soon emerged about the position of communities more heavily impacted by colonisation. How would the succeeding cases and laws acknowledge the pervasive impact of Western laws and priorities in many parts of Australia? And how would they conceptualise the adaptation, resilience, and proud survival of many communities? These were questions that would profoundly test the Western understanding of Aboriginal identity and connection, and the depth of Australia's new reckoning with its silenced history. This new judgment on the *Yorta Yorta*[3]

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appeal seeks to restart the post-*Mabo* handling of these questions, re-centre the First Peoples' voice in the measurement of First Peoples' survival, and walk back the legal thinking that has led us away from *Mabo*'s spark of essential truth.

In the leading *Mabo* judgment, Brennan J had emphasised that native title is sourced in and owes its content to 'traditional laws acknowledged' and 'traditional customs observed'—and the need for a community's substantial maintenance of 'traditional connection' by continued acknowledgement and observance.[4] A full reading of the case reveals that the key terms were often used with deliberate flexibility and qualification, and the detailed analysis and findings in the case appear not to support a strict interpretation of these principles. Moreover, the heavy emphasis on 'traditional laws and customs' can, to a degree, be explained by the precedential context (most notably the 'absence of law' theory of pre-existing Aboriginal and Torres Strait Islander occupation) and indeed the factual context (an initial focus on *inter se* rights within the Meriam community). Yet without this fuller reading and broader context, Brennan J's words could present a narrowing door for claimant communities more impacted by colonisation. And it was the bare passages that were preserved in key provisions of the *Native Title Act 1993* (Cth)—most importantly s 223.

Legal commentators of the time highlighted quite early the risks attending a restrictive approach to the *Mabo* principles.[5] However, the succeeding years saw some habitually selective referencing of *Mabo* and a pattern of litigation that in various ways encouraged quite specific explication of community laws and customs and their survival in fact—for example, to resist Crown assertions of past *legal* extinguishment (at least in part). Moreover, the focus in this era on northern communities perhaps masked the grievous implications of a strict approach for many communities in the south. In all of this context, the more restrictive thinking on requisite 'continuity' did appear to gain some ascendancy.[6]

The *Yorta Yorta* decision

Judicial attention turned directly to these issues in the *Yorta Yorta* litigation, which concerned a claim over land and waters in the early-settled and intensively used Murray River area. The new judgment recounts the history of the litigation. Critically, the trial judge concluded that whatever the contemporary practices of the community, before the end of the 19th century, the claimants' ancestors had ceased to occupy their traditional lands in accordance with their traditional laws and customs. Indeed, the 'tide of history' had 'washed away' any real acknowledgement of traditional laws and real observance of their traditional customs.[7] A Full Federal Court majority noted possible errors in the detail of the approach taken at trial but considered them immaterial given their view that the trial findings did require a rejection of the claim on continuity grounds.[8]

In the critical High Court judgment of Gleeson CJ, Gummow J, and Hayne J, there was a notable focus on the 'intersection' of the traditional system and the common law system—at the point of British assertion of sovereignty.[9] Their

Honours emphasised that the traditional system could not validly create rights, duties, or interests after that point—and hence only ones with origins in prior law and custom could be recognised.[10] More critically, drawing upon s 223, their Honours emphasised that the 'normative system' supporting the rights and interests (and only pre-sovereignty normative rules were to be considered 'traditional'[11]) must have had a 'continuous existence and vitality' for those rights and interests to have survived.[12] It was accordingly considered that the original 'society' must have had continuous survival.[13] Their Honours indicated that 'some' change and adaptation in traditional law and custom or 'some' interruption in the enjoyment or exercise of rights and interests would 'not necessarily be fatal'. However, there appeared to be relatively little scope (or guidance) offered for accommodating the stark realities of many community histories.[14]

Ultimately, their Honours rejected the appeal on the basis of the trial findings as to discontinuity of observance of traditional laws and custom, and discontinuity of traditional 'society'.[15]

How was the decision received?

Much debate emerged around the reasoning in *Yorta Yorta*—particularly as regards the difficulty of both annulling and requiring ongoing 'vitality' in the Aboriginal 'system', and the possible adoption of a quite constricted notion of 'society'. More broadly, commentators have criticised this approach for its denial of past transformations of landscapes and economies,[16] its evidential complexity,[17] its potentially intrusive and divisive differentiation of communities and re-dispossession of those most impacted by past oppression,[18] and more broadly, its dismantling of the promise (and relevance) of the whole native title doctrine.[19] Some of these criticisms have been amplified in proposals for deliberate law reform. Former Chief Justice French suggested some reversal of the relevant onus of proof,[20] and others have argued for clarification (or even removal) of the word 'traditional' in the statute.[21] The Australian Law Reform Commission recommended statutory reform to acknowledge the adaptive nature of traditional laws and customs and mitigate the onerous inquiries drawn from *Yorta Yorta*.[22] Yet political action has come indirectly and at state level—most notably (and partly in response to *Yorta Yorta*) in the *Traditional Owner Settlement Act 2010* (Vic) which offers something of a supported alternative path for communities and turns continuity inquiries more towards contemporary connections.[23]

In the courts, there have been periodic signs of broader thinking on continuity requirements. Prominently, in Black CJ's dissent in the first *Yorta Yorta* appeal, his Honour emphasised that it was wrong to see 'traditional' as a concept concerned with what is 'dead, frozen or otherwise incapable of change'.[24] Gaudron and Kirby JJ (in their own High Court dissent) pressed for a more flexible concept of 'society' and less insistence on close comparison of contemporary and pre-settlement laws and customs. Their Honours suggested that laws and customs qualified as 'traditional' if they had their 'origins' in the past and

differences constituted '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'.[25] After the High Court decision in *Yorta Yorta*, lower courts proceeded in both directions. Some embraced the stricter thinking,[26] but others continued the ad hoc search for flexibility within the bounds of the *Yorta Yorta* framework.[27]

Significant advances are now underway in the Australian approach to native title 'content', driven particularly by the decision in *Akiba v Commonwealth*.[28] Yet there appears to be no significant movement in the continuity principles, beyond ad hoc work at the boundaries,[29] signalling more heavy work for communities struggling to meet the *Yorta Yorta* standard.[30] Moreover, the recent critical compensation decision in *Northern Territory v Griffiths*,[31] with its focus upon the strength and purity of cultural and spiritual connection (in the consideration of non-economic loss),[32] perhaps risks some further discounting (in line with the *Yorta Yorta* heritage) of the strength of First Peoples' *contemporary* connections with land.

The new judgment

This new judgment seeks to retrieve the First Peoples' perspective—too often lost in the complexity of arduous continuity inquiries. It seeks to demonstrate that the most confounding elements of the Australian native title doctrine can be recast into a clearer and more illuminating inquiry and that the doctrine can thereby have a more principled and enduring relevance. The judgment's ultimate focus is on the survival of the Yorta Yorta peoples' custodial ethic. What more can logically and justly be asked of a people pressed into crisis for generations by the dispossession of pastoralism and policy? The challenge for the court is thus reframed as one of recognising adaptation and resilience—rather than measuring cultural erosion.

Notes

1 (1992) 175 CLR 1 ('*Mabo*').
2 Ibid., 76 (Brennan J); 217 (Order of the Court).
3 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 ('*Yorta Yorta*').
4 *Mabo* (1992) 175 CLR 1, 57–60, 70 (Brennan J).
5 See e.g. works by Noel Pearson, Tony McAvoy, Richard H Bartlett, Hal Wootten, Gary D Myers, Luke McNamara and Scott Grattan, Jeremy Webber, Kent McNeil, and Lisa Strelein.
6 See e.g. *Western Australia v Commonwealth* (1995) 183 CLR 373, 452 (Mason CJ, Brennan, Deane, Toohey, Gaudron, and McHugh JJ) (quoted by Brennan CJ in *Wik Peoples v Queensland* (1996) 187 CLR 1, 92); *Commonwealth v Yarmirr* (2001) 208 CLR 1, 46–52 [37]–[50] (Gleeson CJ, Gaudron, Gummow, and Hayne JJ).
7 *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606, [122]–[125], [129] (Olney J).

8 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244, 291–92 [187]–[191] (Branson and Katz JJ).
9 *Yorta Yorta* (2002) 214 CLR 422, 439–40 [31].
10 Ibid., 441–4 [37]–[44].
11 Ibid., 444 [46].
12 Ibid., 444–7 [47]–[55], 456 [87].
13 Ibid., 445–7 [49]–[55], 456–7 [87]–[89].
14 See ibid., 454–7 [78]–[89].
15 Ibid., [95]–[96]. See also 468 [135] (McHugh J).
16 See e.g. Marcia Langton, 'The Aboriginal Balancing Act' (2013) (115) *Australian Geographic* 39.
17 See e.g. Paul Finn, 'A Judge's Reflections on Native Title' in Sean Brennan et al. (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 23, 26–7.
18 See e.g. Richard Bartlett, 'An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: *Yorta Yorta*' (2003) 31(1) *University of Western Australia Law Review* 35.
19 See further Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008).
20 See Robert French, 'Lifting the Burden of Native Title: Some Modest Proposals for Improvement' (Speech, Federal Court Native Title User Group, 9 July 2008).
21 See e.g. Noel Pearson, *Up from the Mission: Selected Writings* (Black Ink Books, 2009) 75.
22 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (Report No 126, April 2015), recommendations 5-1, 5-2, 5-3, 5-4.
23 Relevant here also, but beyond the scope of this discussion, are the broader progress towards treaty negotiations (including in Victoria) and the Noongar native title settlement in the south of Western Australia.
24 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244, 256 [35].
25 *Yorta Yorta* (2002) 214 CLR 422, 464 [114]–[119].
26 See e.g. *Daniel v Western Australia* [2003] FCA 666; *Risk v Northern Territory* [2006] FCA 404; *Risk v Northern Territory* (2007) 240 ALR 75.
27 See e.g. *De Rose v South Australia* (2003) 133 FCR 325; *De Rose v South Australia [No 2]* (2005) 145 FCR 290; *Bennell v Western Australia* (2006) 153 FCR 120. But see *Bodney v Bennell* (2008) 167 FCR 84.
28 (2013) 250 CLR 209 (recognition of a subsisting broad resource use right).
29 See e.g. *Croft on behalf of Barngarla Native Title Claim Group v South Australia* (2015) 325 ALR 213; *Narrier v Western Australia* [2016] FCA 1519; *Ashwin on behalf of Wutha People v Western Australia [No 4]* (2019) 369 ALR 1.
30 See e.g. *CG (dec'd) on behalf of the Badimia People v Western Australia* [2015] FCA 204; *Sandy on behalf of Yugara People v Queensland* (2017) 254 FCR 107; *Starkey on behalf of Kokatha People v South Australia* (2018) 261 FCR 183.
31 *Northern Territory v Griffiths (dec'd) on behalf of Ngaliwurru and Nungali Peoples* (2019) 364 ALR 208.
32 See e.g. ibid., 238 [98], 257 [166], 269–70 [217] (Kiefel CJ, Bell, Keane, Nettle, and Gordon JJ). Cf. 256–7 [163], 268 [230] (Kiefel CJ, Bell, Keane, Nettle, and Gordon JJ).

MEMBERS OF THE YORTA YORTA ABORIGINAL COMMUNITY ..... APPELLANT;

AND

VICTORIA ..... RESPONDENT;

(2002) 214 CLR 422

Native title—Continuity of laws and customs—Custodial responsibilities to country—Inherent sovereignty as peoples.

Burns J.[1]

Introduction

[1] According to First Peoples' protocols, it is incumbent on me to introduce myself and my cultural affiliations. I am a Gomeroi-Kamilaroi woman. My family connections are to Bingara on the Gwydir River in north-west New South Wales. My great-grandmother was a member of the stolen generations—her removal from Country meant that we were denied the opportunity of learning language and culture. However, as the following discussion of First Peoples' philosophical worldviews explains, this does not necessarily mean that our connection to Country is 'lost'.

[2] It is also incumbent on me to state that under First Peoples' laws, I have no authority whatsoever to sit in judgment of another First Peoples group. This is a fundamental recognition of the diversity and inherent sovereignty of First Peoples. The questions before this court, however, go to the relationship between the Yorta Yorta peoples and the agencies of the Australian nation-state. They come before the court rather belatedly, and regrettably in the absence of any formal treaty between the Yorta Yorta peoples and the British colonial government (or its successors). This case, however, presents an opportunity to set the relationship between the Yorta Yorta peoples and Australian governments on a new footing, one based on equality and mutual respect. Acknowledging the inherent sovereignty of First Peoples must be the starting point for re-setting this relationship and for consideration of the issues in this case.

The application

[3] The Yorta Yorta peoples have brought a claim under the *Native Title Act 1993* (Cth) ('*NTA*') for recognition of native title over their ancestral lands.

The claimant group is represented by eight applicants: Ella Anselmi, Wayne Atkinson, Geraldine Briggs, Kenneth Briggs, Elizabeth Hoffman, Desmond Morgan, Colin Walker, and Margaret Wirrpunda. Broadly speaking, the claim encompasses all 'public lands' within an oval-shaped area of some 5,000 square kilometres which straddles what is now known as the border between Victoria and New South Wales. The details of the claim are set out in the judgment.[2] While the state boundaries were immaterial to the Yorta Yorta peoples pre-1788, they are significant in this case because they determine the different colonial statutory regimes that the court must apply in this case and the consequences of such regimes for the continuing enjoyment of native rights and interests. Within the scheme of the *NTA*, the various statutory regimes and the rights and interests they grant to other parties may have the effect of 'extinguishing' the Yorta Yorta peoples' native title.

[4] The Yorta Yorta peoples' native title claim was made on the basis that their current beliefs and practices were an expression of their 'traditional' laws and customs in an 'adapted form'. In short, these beliefs and practices go to the exercise of the Yorta Yorta peoples' custodial responsibilities to Country.[3] The Yorta Yorta peoples also argued that since colonisation of their lands in the 1840s, they have made numerous attempts to assert their custodial responsibilities towards Country, which is evidence of the continuation of their laws and customs.[4]

[5] The Yorta Yorta peoples' native title claim was vigorously opposed. The main respondents, New South Wales and Victoria, both denied the existence of the Yorta Yorta peoples' native title.[5] There were over 500 non-claimant parties to the proceedings, most of which also denied the existence of native title.[6] The respondents primarily asserted that their interests were likely to be adversely affected by a positive determination of native title.[7]

[6] In my view, the Yorta Yorta peoples have proven their native title claim. This is because the Yorta Yorta peoples' present observance of their laws and customs is an incident of their inherent sovereignty as *peoples*. The Yorta Yorta peoples' present acknowledgement and observance of their laws and customs also reflect their custodial responsibilities to care for Country. Despite the ravages of colonisation and the concerted efforts of colonial governments to disrupt the Yorta Yorta peoples' laws and culture, they have maintained their identity as *peoples* through their connection to their ancestral lands. In my opinion, these are the critical elements that must be proven in this case.

Findings of the trial judge

[7] The key finding of the trial judge, Olney J, was that by the end of the 19th century, the claimants' ancestors had:

> ceased to occupy their traditional lands in accordance with their traditional laws and customs. The tide of history has indeed washed away any

> real acknowledgement of their traditional laws and any real observance of their traditional customs.[8]

[8] Based on this finding, the trial judge concluded that the foundation of the Yorta Yorta peoples' claim had 'disappeared', and therefore any native title rights and interests they might have previously held had suffered a similar fate. The trial judge also found that once native title is 'lost', it is not capable of revival.[9] In making this assessment, the trial judge regarded the writing of an early settler, Edward Curr, who lived in Yorta Yorta country for ten years, as the most credible source of evidence of the 'traditional' laws and customs of the group.[10] This evidence was afforded considerable weight in comparison to the testimony of the Yorta Yorta peoples themselves, which was based on 'oral traditions passed down through *many generations extending over a period in excess of two hundred years*'.[11] In addition, the trial judge found that the Yorta Yorta peoples' petition to the Governor of New South Wales in 1881 provided 'positive evidence' of the discontinuation of their laws and customs.[12] The details of this petition and its interpretation by the courts will be discussed further below.

Appeals

[9] The fundamental questions raised in this appeal go to the interpretation of s 223 of the *NTA*, which defines native title as:

> the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where: (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and (c) the rights and interests are recognised by the common law of Australia.

[10] The Yorta Yorta peoples appealed the decision of the trial judge.[13] The primary grounds for the appeal were that the trial judge adopted a 'frozen in time' approach to determining the existence of traditional laws and custom by requiring evidence of 'traditional' laws and customs as they existed at the point of first contact, and their continued acknowledgement and observance until the present time.[14] Further, it was argued that the trial judge had failed to give consideration to the capacity of 'traditional' laws and customs to adapt to changed circumstances.[15] In short, the appellants contended that the trial judge wrongly equated native title with the existence of a 'traditional society' or a 'traditional lifestyle'.[16]

[11] The appellants also argued that the trial judge had erred by ignoring historical evidence of the Yorta Yorta peoples' continuing connection with

Country and the evidence of living witnesses about the circumstances in which the Yorta Yorta peoples found themselves by the end of the 19th century.[17] While the majority in the Federal Court found that the trial judge had erred in his approach to issues of proof of 'traditional' laws and customs, they concurred with the trial judge's conclusion that the Yorta Yorta peoples' native title had been lost, through the 'abandonment' of their laws and customs, as established on the facts of the case.[18]

[12] The matter is now the subject of appeal before this court. The grounds for the appeal include, inter alia, that both the trial judge and the Full Court of the Federal Court took an overly restrictive approach to questions of proof, requiring the claimants to provide positive evidence of the continued observance of traditional laws and customs from the time of British colonisation to the present.[19] It was also argued that s 223(1) of the *NTA* directs attention to the rights and interests '*presently* possessed under traditional laws *presently* acknowledged and customs *presently* observed', and also to continuing connection by those laws and customs.[20] That appeal has been dismissed by the majority judges in this court. This dissenting judgment will set out the reasons for finding in favour of the Yorta Yorta peoples. Importantly, it centres an Indigenous knowledges approach and an understanding of First Peoples' legal philosophies to the questions for determination by this court. Given the protracted history leading to the belated recognition of native title in this country (and other issues which I will address in this judgment), the inclusion of First Peoples' knowledges and legal philosophies provides a welcome and necessary addition to the court's jurisprudence. Before doing so, I will make some brief observations about the role of the courts in deciding native title claims, and also some of the problems with the approach taken by the majority judges in this case.

The role of the courts

[13] This case is of great significance because it is the first time this court will interpret the requirements for proof of native title under the *NTA* as amended by the *Native Title Amendment Act 1998* (Cth).[21] It is also the first case to consider the potential for native title to be enjoyed in the areas most extensively affected by British colonisation, the south-eastern parts of what is now known as Australia. Therefore, the case is of great importance because it will set the scope for the potential for native title into the future, with significant consequences for the legal, political, cultural, social, and economic status of First Peoples in this country. The role of the courts in adjudicating cases of such import cannot be understated.

[14] The case of *Mabo v Queensland (No 2)*[22] ('*Mabo*') recognised a fundamental injustice. That the Australian nation-state came into being by virtue of a 'legal fiction', the doctrine of terra nullius.[23] *Mabo* found that as a consequence of the application of terra nullius, First Peoples were denied their

rights and interests in land.[24] The belated recognition of First Peoples' native title was, however, subject to a limitation—it was said to be 'precluded if such recognition would fracture a skeletal principle of the Australian nation state'.[25] Precisely what was meant by the term 'skeletal principle' was not made entirely clear.

[15] While the High Court's decision in *Mabo* has been celebrated for ostensibly rejecting the doctrine of terra nullius, it shied away from any consideration of the legitimacy of the British assertion of sovereignty in Australia, declaring that such a matter was an 'act of state' that could not be challenged in the municipal courts.[26] This view has been strongly criticised, and for good reasons.[27] It is entirely contradictory for the court to reject terra nullius on one hand—to give belated recognition to First Peoples' native title—while on the other hand leaving terra nullius intact for all other purposes. There is a strange and irreconcilable incoherence[28] between the High Court's recognition of 'native title', based on First Peoples' laws and customs, and the denial of the inherent sovereignty of First Peoples, from which those laws and customs are derived.

[16] The opinion of the trial judge was that the *NTA* did not provide a warrant for the 'court to play the role of social engineer, righting the wrongs of the past centuries and dispensing justice according to contemporary notions of political correctness rather than according to law.'[29] This contention, however, is problematic for a number of reasons.

[17] As was observed by Merkel J in *Shaw v Wolf*,[30] a case where the Aboriginality of several persons was contested for the purpose of their eligibility to stand for election to the former Aboriginal and Torres Strait Islander Commission:

> it is unfortunate that the determination of a person's Aboriginal identity, a highly personal matter, has been left by a Parliament that is not representative of Aboriginal people to be determined by a Court which is also not representative of Aboriginal people. Whilst many would say that this is an inevitable incident of political and legal life in Australia, I do not accept that that must always be necessarily so. It is to be hoped that one day if questions such as those that have arisen in the present case are again required to be determined that that determination might be made by independently constituted bodies or tribunals which are representative of Aboriginal people.[31]

[18] The same caution must be exercised—*a fortiori*—with respect to claims brought under the *NTA* generally, and specifically to the case before the court. There is an inherent danger in colonial courts adjudicating matters pertaining to First Peoples' identity and rights by requiring proof of the existence of 'traditional' laws and customs to establish such rights. Such a process inevitably involves an exercise of judicial power to determine whether the rights arising under First Peoples' laws can be translated to a

form which is acceptable to the colonial legal system. As the passage of this case before the courts has shown, and as has been admitted by the majority judges in this court, such a process is 'fraught with evident difficulty'.[32] It invokes the now repugnant common law 'scale of organisation' test,[33] which was firmly rejected in *Mabo*.[34] But there is a much more compelling reason to reject this approach: the rights (and obligations) arising from First Peoples' laws are an incident of the inherent sovereignty of First Peoples. It is no longer acceptable to maintain that the current circumstances First Peoples find themselves in is 'an inevitable incident of political and legal life in Australia'. It must also be acknowledged that First Peoples' laws and customs with respect to Country (or in fact any other matters those laws address) are derived from the inherent sovereignty of First Peoples. To deny this fundamental truth would maintain the legal fiction of terra nullius, both in theory and substance. Acknowledging the inherent sovereignty of First Peoples as the starting point for interpreting the *NTA* can be achieved without 'fracturing a skeletal principle' of the Australian legal system.

The majority judgment

[19] In my view, the majority judgment produced an unnecessarily restrictive construction of native title which is completely unwarranted by the text of the *NTA*. The problem stems from what the majority judges regarded as a 'fundamental principle' which should inform the interpretation of the *NTA*—that after the British assertion of sovereignty, there could be 'no parallel law-making system'. This 'fundamental principle' infected all other aspects of the majority judgment. It informed the majority's view that the *NTA* requires proof of both the existence and the continuation of 'traditional' laws and customs *from the time of the British assertion of sovereignty to the present*. In effect, it introduces a *presumption of terra nullius*. Such an approach is repugnant to contemporary standards of justice and must be firmly rejected. This approach is also entirely contrary to First Peoples' concepts of law, as the following discussion of First Peoples' legal philosophies will show.

First Peoples' philosophies and laws

[20] First Nations and Peoples are diverse.[35] From First Peoples' perspectives, this land now known as Australia is a 'continent' and not a country.[36] This understanding reflects the diversity of First Peoples and the inter-national relationships between different First Peoples. It is an acknowledgement of the inherent sovereignty of each First Peoples group, and a philosophical worldview based on inclusivity and respect for difference, co-existence, and co-operation.[37] The diversity of First Peoples means that it is not possible to

articulate a 'universal' concept of First Peoples' law, or more correctly, laws. Indeed, to attempt to do so would be antithetical to First Peoples' respect for diversity and difference. For the purposes of the present case, however, it is helpful to identify some shared philosophical features of First Peoples' laws and worldviews, which will inform my judgment.

[21] First Peoples' laws are sourced from our creation ancestors, who travelled across the landscape, putting people on Country and giving us laws to live by. Being descended from the creation ancestors, First Peoples are born from Country. Our ancestral lines connect us to Country. Our embodiment is the physical manifestation of our connection to Country.[38] Our identification with Country and kin is the basis of our law and culture. This connection to Country has been described as an 'ontological relationship to land'.[39]

[22] First Peoples' worldviews emphasise the 'inter-connectedness' of all living things.[40] This inter-connectedness has also been expressed as 'relationality'[41] and 'relatedness'.[42] Relationality means First Peoples' identity is understood in the context of our relationships to our ancestral beings, kin, and Country.[43] From First Peoples' perspectives, relatedness is to 'know who you are, where you are from and how you are related'.[44] Relatedness also extends to other living entities, including animals, plants, waterways, climate, skies, and spirits.[45] First Peoples' 'relationality' is also underpinned by both 'connections with one's country and the spirit world'[46] and a belief that the land is a living entity.[47] Our spiritual connection to Country and kin provide the foundation for First Peoples' identity, culture, and law, which do not fit neatly into positivistic legal doctrinal categories.[48] This understanding has particular significance for the case at hand.

[23] First Peoples' relationality to land means that Country forms part of our kinship systems. While kinship may have been damaged by colonisation, the kinship system never changes because each individual and clan group is connected to Country through their creation ancestors.[49] Maintaining relationships with Country is so fundamental to First Peoples' ways of knowing and being that looking after Country is an imperative under First Peoples' laws.[50] The relationship with land is so central to First Peoples' ontologies and ways of being that 'the land is the law'.[51] The kinship relation between people and Country also instils a 'custodial ethic' towards land, which is fundamentally different from Western concepts of property ownership.[52] The depth of the kinship between people and Country is frequently expressed as 'belonging to Country'.[53]

[24] Relationality and relatedness are also reflected in the principle of reciprocity, which is central to First Peoples' understandings of law and sovereignty. Reciprocity is a major principle of Aboriginal law, and 'the highest level of reciprocity is to the land. We must care for the land (or place), because it cares for us and provides all of our needs'.[54] Reciprocity is also reflected in First Peoples' concepts of sovereignty, which are fundamentally different from the Euro-centred construction of the sovereign nation-state. First

Nations sovereignty is underpinned by the understanding that: '[o]ur obligations were to law and we were responsible for the maintenance of country for the benefit of future carers of law and country'.[55]

[25] Because First Peoples' law and relatedness to Country is grounded in our creation ancestors, it is described by Mary Graham as 'natural moral law' which, unlike Western positivist concepts of law, is not the product of human agency, nor can it be extinguished.[56] However, this concept of 'natural moral law' is not to be confused with the Western canon of 'natural law', which is derived from 'divine law' or the precepts of Christianity.[57] It is a distinction that recognises the enduring nature of First Nations' laws which are deeply embedded in Country: they are omnipresent and eternal.

[26] While Australian courts have attempted to grapple with these differences to a degree,[58] the outcome for First Peoples has generally been that our connections to Country are not equally valued or seen as commensurate with Western constructs of 'property rights'. As mentioned earlier, this case presents an opportunity to correct this misconception—which has led to gross injustices for First Peoples. The interpretation of the *NTA* through the lens of First Peoples' sovereign connections to Country is an important step towards bridging this gap.

Proof of native title

[27] As stated above, the primary issues on appeal go to the interpretation of s 223(1) of the *NTA*, which defines native title rights and interests. Interpretation of this provision must be informed by an understanding of First Peoples' legal philosophy and come from a First Peoples' sovereignty perspective.

Meaning of 'traditional' law and customs

[28] The ordinary meaning of the word 'traditional' is continuity with the past.[59] First Peoples' understanding of law as being birthed by the creation ancestors putting both people and law on Country gives rise to a different understanding of 'traditional' in this context. As human beings are the living embodiment of First Peoples' laws, the identification of people with a particular tract of Country is evidence itself that traditional law exists. What is important to establish proof of 'traditional' laws and customs is that a group of people continue to identify themselves by their relationship to a particular tract of Country. This 'belonging' to Country is evidence of 'tradition' in the sense of continuity with the past.

[29] In this case, the Yorta Yorta peoples have demonstrated that they are descended from human ancestors, Edward Walker and Kitty Atkinson/Cooper, who were descended from persons who inhabited part of the claim area in the early 1800s.[60] From this, it can be inferred that those same

ancestors were descended from people in occupation of that same country prior to 1788. The Yorta Yorta peoples have shown that they have maintained their identity as a people through their ongoing relationship with Country. Thus, the Yorta Yorta peoples have proven the existence of 'traditional' laws and customs as required by s 223.

Continuity of laws and customs

[30] The ongoing identification of a First Peoples with Country is also strong evidence of the continuity of laws and customs. There are also other factors that must also be taken into account from a First Peoples' perspective.

[31] There is no doubt that the dramatic changes wrought upon First Peoples as a result of colonial government policies of relocation and the active suppression of Aboriginal languages and cultures have had a significant impact on the modes and practices of laws and customs. What is important for the purpose of this inquiry is that the fundamental principles that underpin First Peoples' laws are still active and operative in the contemporary context. The 'custodial ethic' that is imperative to First Peoples' laws and customs provides a strong indicium of the continuity of law and customs.

[32] In this case, the Yorta Yorta peoples have demonstrated a long history of asserting custodial responsibilities for their ancestral lands. In evidence, it was shown that since colonisation, there were no less than 12 significant attempts by the Yorta Yorta peoples to assert their custodial responsibilities.[61] The evidence also demonstrated that the Yorta Yorta peoples continue to assert custodial responsibilities for Country today, particularly in relation to the protection of sacred sites, the conservation of food, timber, and natural resources, and the 'proper management' of land.[62]

[33] Before the Federal Court, much significance was accorded to a petition made by the Yorta Yorta peoples to the Governor of New South Wales in 1881, which was interpreted as positive evidence of the loss of traditional laws and customs. In my view, this petition has been completely misconstrued and the interpretation given to it by the court to date fails to appreciate the extreme oppression and deprivation that the Yorta Yorta peoples were living under at the time it was made. To put this petition into its proper context, it is necessary to map out the evidence of the Yorta Yorta peoples' experiences of colonisation and the profound changes to their material conditions and way of life in the period leading to the petition.

Yorta Yorta peoples' experiences of colonisation

[34] The first Europeans to enter the claim area were Hamilton Hume and William Hovell in 1824.[63] Major Thomas Mitchell closely followed in 1836, an encounter which included violent clashes with Aboriginal groups along the Murray River 'downstream from the claim area'.[64] Charles Sturt first

travelled in the vicinity of Yorta Yorta country in 1829. Upon returning to the claim area in 1838, Sturt observed that many Aboriginal people were infected with smallpox and that '[i]t must have committed dreadful havoc amongst them, since on this journey, I did not see hundreds to the thousands I saw on my former expedition'.[65] Between 1837 and 1839, tens of thousands of stock were brought into the area, and by 1840 most land along the Murray and Goulburn rivers had been occupied by pastoralists.[66] The trial judge observed that '[c]onflict occurred at numerous stations. In many cases large, organised groups of Aborigines were involved'.[67] Clearly, the Yorta Yorta peoples fiercely resisted the colonial invasion of their lands.[68] By the 1850s, however, the Aboriginal population had been 'drastically reduced' by disease and conflict, and it was recorded that 'physical resistance to settlement had ceased'.[69] By 1857, just 20 years after the start of the colonial occupation of Victoria, there were only 1,769 Aborigines left living in the whole of Victoria.[70]

[35] In 1858, a Select Committee was appointed to investigate the present condition of Aboriginal people and the 'best means of alleviating their absolute wants'.[71] Following this inquiry, a number of government-sponsored missions and reserves were established in Victoria; however, in Yorta Yorta country, only ration depots were created. Local squatters were appointed as 'guardians' of Aboriginal people, and children were removed from their families to be 'properly' educated and to dissociate them from 'traditional distractions'.[72] In 1865, Daniel and Edward Matthews took up Moira Station, an area of 800 acres. After discovering that part of the station had been traditionally used as a meeting place, 20 acres were set aside in 1874 to establish Maloga Mission.[73] By the 1880s, serious problems emerged at Maloga because Aboriginal people resented moves by Daniel Matthews to 'limit traditional ceremonial activities and the sanctions imposed such as loss of rations, if people failed to attend Christian services'.[74] He had also taken to 'physically beat children and young women if they committed offences of a moral or religious nature'.[75] Aboriginal men at Maloga also 'resented the intrusions on their freedom and demanded greater autonomy'.[76] These events coincided with proposals by the Victorian government to disperse 'half castes' from missions and stations which were enshrined in legislation in 1886.[77] Although the Aboriginal Protection Association installed a new manager, George Bellenger, in 1887, he also proved to be extremely unpopular.[78] In 1888, a number of huts and houses were moved from Maloga to a new reserve established at Cummeragunja, across the New South Wales border.[79]

[36] This brief history of the Yorta Yorta peoples' experiences of dispossession and oppression under British colonial rule provides an important context for interpreting the petition to the Governor of New South Wales in 1881. This petition has been cited by the trial judge as positive evidence of the Yorta Yorta peoples' loss of traditional laws and customs.[80] However, such an interpretation fails to appreciate the conditions Yorta Yorta peoples were

living under at the time it was made. The text of the petition is reproduced here:

> To His Excellency Lord Augustus Loftus, G.C.B., Governor of the colony of New South Wales—The humble petition of the undersigned Aboriginal natives, residents on the Murray River in the colony of New South Wales, members of the Moira and Ulupna tribes, respectfully showeth:
>
> 1. That all the land within our tribal boundaries has been taken possession of by the Government and white settlers; our hunting grounds are used for sheep pasturage and the game reduced and in many places exterminated, rendering our means of subsistence extremely precarious, and often reducing us and our wives and children to beggary.
> 2. We, the men of our several tribes, are desirous of honestly maintaining our young and infirm, who are in many cases the subjects of extreme want and semi-starvation, and we believe we could, in a few years support ourselves by our own industry, were a sufficient area of land granted to us to cultivate and raise stock.
> 3. We have been under training for some years and feel that our old mode of life is not in keeping with the instructions we have received and we are earnestly desirous of settling down to more orderly habits of industry, that we may form homes for our families. We more confidently ask this favour of a grant of land as our fellow natives in other colonies have proven capable of supporting themselves, where suitable land has been reserved for them.
>
> We hopefully appeal to your Excellency, as we recognise you, The Protector specially appointed by Her Gracious Majesty the Queen 'to promote religion and education among the Aboriginal natives of the colony', and to protect us in our persons and in the free enjoyment of our possessions, and to take such measures as may be necessary for our advancement in civilization.

[37] The trial judge's assessment of this petition was that it expressed a desire to change from the 'old mode of life' in favour of 'settling down to more orderly habits of industry'.[81] Although it was acknowledged that Edward Matthews most likely played a part in composing the petition, it was concluded that the extent of his influence on the document was unknown.[82] But the conditions at Maloga at the time and the language deployed suggest that Matthews' influence over the petitioners was strong. Other aspects of the evidence also provide important context for interpreting the petition. The petition documents how the totality of Yorta Yorta country had been occupied by the government and white settlers, that their traditional food sources were severely depleted or exterminated. It also highlights their 'extreme want and semi-starvation' and a genuine desire to be able to provide for

their families. These statements must also be understood in light of the circumstances at Maloga mission at the time—where Matthews was limiting traditional ceremonial activities and withholding rations from people who challenged his authority. Not surprisingly, Aboriginal men resented the curtailment of their autonomy and independence. There is no doubt that the petitioners were living under circumstances of extreme oppression and coercive control. By reading the petition with these factors in mind, it can be better understood as an assertion of the Yorta Yorta peoples' inherent sovereignty, a plea to have greater control over their own affairs and to regain a foothold in their country which had been unjustly usurped from them. What is most remarkable is the Yorta Yorta peoples' resilience and steadfast determination to maintain their authority in Country in the face of almost complete colonial domination.

[38] The Yorta Yorta peoples have demonstrated a long history of asserting custodial authority over their ancestral lands. As earlier observed, the trial judge noted that the evidence showed no less than 12 significant attempts by the Yorta Yorta peoples to regain some control over their Country.[83] The evidence also demonstrated that the Yorta Yorta peoples continue to uphold their custodial responsibilities for Country today, through their advocacy to ensure the protection of sacred sites, the conservation of food resources, and the 'proper management' of land. Clearly, the evidence of Yorta Yorta peoples' sustained and ongoing endeavours to exercise their custodial obligations to Country is proof of the continuing acknowledgement and observance of their laws and customs. As Black CJ in the dissenting judgment of the Federal Court said, '[t]he law and custom at the heart of the application was that the claimants are the owners according to Aboriginal tradition…They had maintained their connection with the land: *they were, and remained, the indigenous people of the claimed land and waters*'.[84]

Connection to Country

[39] The findings in relation to continuity of the Yorta Yorta peoples' laws and customs equally apply to the issue of connection to Country. However, for the sake of completion, this element will now be addressed. First Peoples' laws are sourced from the creation ancestors, who put people on Country and gave them laws to live by. First Peoples' relatedness to Country and the laws flowing from that relationship reflect a custodial ethic towards Country. The continuing and ongoing exercise of custodial responsibilities flowing from the laws and customs of the group provides strong evidence of connection to Country. In this case, the Yorta Yorta peoples have demonstrated their relatedness to Country through their ongoing assertion of custodial responsibilities to look after Country. Therefore, the Yorta Yorta peoples have demonstrated their connection to Country under their laws and customs.

Conclusion on proof of native title

[40] The evidence in this case has demonstrated that the Yorta Yorta peoples, having descended from the creation ancestors and by following the laws and customs given to them, have maintained their relatedness and connection to Country. I must stress that what is crucial here is that the Yorta Yorta community have survived *as peoples*. Most importantly, the Yorta Yorta peoples' law and customs are incidents of their inherent sovereignty as *peoples*. Despite the ravages of colonisation and concerted efforts to undermine their law, culture, and way of life, the Yorta Yorta peoples have shown extraordinary persistence, strength, determination, and resilience. They have maintained their relatedness to Country against the odds. And they have consistently and persistently asserted their custodial responsibilities towards Country. Although these efforts have been mostly met with bureaucratic ignorance and indifference, over the past 200 years they have continued to assert their custodial responsibilities for Country at every available opportunity. I find that the Yorta Yorta peoples have proven their native title over their ancestral lands and waters. Yorta Yorta Country needs its people, and the Yorta Yorta peoples have always been there for Country.

Notes

1 Marcelle Burns. This research has been supported by an Australian Government Research Training Program Scholarship.
2 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 423–4, ('*Yorta Yorta HCA*').
3 *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606, [122]–[125] ('*Yorta Yorta FCA*').
4 Ibid., [122]–[125].
5 Ibid., [18].
6 Ibid., [7].
7 Ibid., [18].
8 Ibid., [129].
9 Ibid., [129].
10 Ibid., [105]. See Edward M Curr, *Recollections of Squatting in Victoria, Then Called the Port Phillip District (From 1841–1851)* (George Robertson, 1883); Edward M Curr, *The Australian Race: Its Origins, Language, Customs, Place of Landing in Australia and the Routes by Which It Spread Itself Over that Continent* (John Farnes, 1886).
11 *Yorta Yorta FCA*, [106] (emphasis added).
12 Ibid., [119].
13 See *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244 ('*Yorta Yorta FCAFC*').
14 Ibid., 264, [64]–[66].
15 Ibid., 249, [11].
16 Ibid.
17 Ibid.
18 Ibid., 283, [145]; 286–287, [164] (Branson and Katz JJ); 271, [91] (Black CJ, dissenting).
19 *Yorta Yorta HCA*, 438–439, [26]–[28].

20 Ibid., 438–439, [28].
21 Ibid., 431, [4].
22 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('*Mabo*').
23 Ibid., 42.
24 Ibid.
25 Ibid., 43.
26 Ibid., 31.
27 Michael Mansell, 'The Court Gives an Inch but Takes Another Mile' (1992) 2(57) *Aboriginal Law Bulletin* 4, 4–5; Irene Watson, 'Indigenous Peoples' Law-Ways: Survival against the Colonial State' (1997) 8 *Australian Feminist Law Journal* 39, 48.
28 Kimberlee Crenshaw, 'Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law' (1998) in Michael DA Freeman (ed), *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell, 7th ed, 2001) 1346, 1360. Crenshaw speaks of the incoherence of legal doctrines which purport to recognise equality yet which fail to effect equality in real terms.
29 *Yorta Yorta FCA*, [17].
30 *Shaw v Wolf* (1998) 83 FCR 113.
31 Ibid., 137.
32 *Yorta Yorta HCA*, 447, [55].
33 *In Re Southern Rhodesia* [1919] AC 211, 233–4; *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.
34 *Mabo* (1992) 175 CLR 1, 40.
35 Irene Watson, 'Settled and Unsettled Spaces: Are We Free to Roam?' in Aileen Moreton-Robinson (ed), *Sovereign Subjects: Indigenous Sovereignty Matters* (Allen and Unwin, 2007), 20–1.
36 Ambellin Kwaymullina, 'Aboriginal Nations, the Australian Nation-State and Indigenous International Legal Traditions' in Irene Watson (ed), *Indigenous Peoples as Subjects of International Law* (Routledge, 2018), 5.
37 Watson (n 35).
38 Aileen Moreton-Robinson, 'The Possessive Logic of Patriarchal White Sovereignty: The High Court and the Yorta Yorta Decision' (2004) 3(2) *Borderlands e-Journal*, [24].
39 Aileen Moreton-Robinson, 'I Still Call Australia Home: Indigenous Belonging and Place in a White Postcolonizing Society' in Sara Ahmed et al. (eds), *Uprootings/Regroundings: Questions of Home and Migration* (Berg Press, 2003), 33 ('I Still Call Australia Home').
40 Irene Watson, 'Kaldowinyeri-Munaintya: In the Beginning' (2000) 4(1) *Flinders Journal of Law Reform* 3, 6.
41 Moreton-Robinson, 'I Still Call Australia Home' (n 39) 34.
42 Karin Martin, *Please Knock before You Enter: Aboriginal Regulation of Outsiders and the Implications for Researchers* (Post Pressed, 2008) 66; Karin Martin and Booran Mirraboopa, 'Ways of Knowing, Being and Doing: A Theoretical Framework and Methods for Indigenous and Indigenist Research' (2003) 27(76) *Journal of Australian Studies* 203, 205.
43 Martin (n 42) 76; Mary Graham, 'Some Thoughts about the Philosophical Underpinnings of Aboriginal Worldviews' (2008) 45 *Australian Humanities Review* 181, 182–3.
44 Martin (n 42) 69–71.
45 Martin and Mirraboopa (n 42) 207.
46 Moreton-Robinson, 'I Still Call Australia Home' (n 39) 34.
47 Central Land Council, *The Land is Always Alive* (Australian Print Group, 1994) 4.
48 See also Marcelle Burns, *Challenging the Assumptions of Positivism: An Analysis of the Concept of Society in Sampi on behalf of the Bardi and Jawi People v Western Australia [2010] and Bodney v Bennell [2008]* (Native Title Research Unit Issues Paper No 7, May 2011) 2–6; Marcelle Burns and Jennifer Nielsen, 'Dealing with the "Wicked" Problem of

Race and the Law: A Critical Journey for Students (and Academics)' (2018) 28(2) *Legal Education Review* 1, 18.
49 Graham (n 43) 182–3.
50 Martin and Mirraboopa (n 42) 211.
51 Graham (n 43) 181–3.
52 Ibid.
53 Watson (n 40).
54 Penny Tripcony, 'The Native Title Mediation Process in Relation to Quandamooka: An Overview' in R Ganter (ed), *Stradbroke Island: Facilitating Change Public Seminar held by the Queensland Studies Centre with Quandamooka Land Council* (Griffith University, 1997) 61, cited in Martin (n 42) 78.
55 Irene Watson, 'Aboriginal Laws and the Sovereignty of Terra Nullius' (2002) 1(2) *Borderlands e-Journal* 49.
56 Graham (n 43) 190–1.
57 See e.g. Hugo Grotius, *On the Law of War and Peace*, tr Francis W Kelsey (Bobbs-Merrill, 1925), who regarded natural law as the precepts of divine or Christian law, as dictated by 'right' reason: xl–xli.
58 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141; *Western Australia v Ward* [2002] 213 CLR 1.
59 *Yorta Yorta HCA*, 459, [101] (Gaudron and Kirby JJ).
60 *Yorta Yorta FCA*, [104].
61 Ibid., [119].
62 Ibid., [112]–[113].
63 Ibid., [27].
64 Ibid., [28].
65 Ibid., [31].
66 Ibid., [34].
67 Ibid., [34].
68 See also Aboriginal Community Elders Service, *Aboriginal Elders' Voices: Stories of the 'Tide of History': Victorian Indigenous Elders Life Stories & Oral Histories* (Language Australia Limited, 2003) 167–71.
69 *Yorta Yorta FCA*, [35].
70 Ibid., [36].
71 Ibid., [36].
72 Ibid.
73 Ibid., [36]–[37].
74 Ibid., [40].
75 Ibid.
76 Ibid.
77 Ibid., [39].
78 Ibid., [41].
79 Ibid., [40].
80 Ibid., [121].
81 Ibid., [120].
82 Ibid., [121].
83 Ibid., [61].
84 *Yorta Yorta FCAFC*, 269, [83] (emphasis added).