Members of the Yorta Yorta Aboriginal Community v State of Victoria

[2001] FCA 45 (8 February 2001)

Black CJ, Branson and Katz JJ

Most observers of native title are aware of the devastating findings by Justice Olney in relation to the native title application of the Yorta Yorta people of the Murray and Goulburn Rivers region. Olney J determined that native title did not exist in relation to the country of the Yorta Yorta nations because the 'tide of history had washed away' their observance of the traditional law and custom, which is required to support common law native title. Justice Olney took this expression of the tide of history from the judgement of Justice Brennan in the *Mabo* case. However, it has been questioned whether the idea was appropriately applied in the circumstances before the court in Yorta Yorta where there is clearly a continuing cultural community, descended from the original inhabitants, identifying as the owners of the area. Olney J was influenced by the greater impact of colonisation in the more settled areas of New South Wales and Victoria and the resulting impact on the way of life of Indigenous people in such areas. Because of this finding, his Honour found it unnecessary to give substantial consideration to the extent of extinguishment or inquire into the current culture and practices of the Yorta Yorta.

The decision was appealed to the Full Federal Court. In his last case, the late Ron Castan QC argued on behalf of the Yorta Yorta that Olney J had wrongly adopted what was described as a 'frozen in time' approach to the question of traditional connection. Olney J failed, the appellants argued, to give sufficient regard to the capacity for evolution and change in traditional law and custom and the adaptation to the pressures of colonisation. Rather, Olney J had equated native title and the maintenance of connection with the maintenance of a 'traditional' lifestyle

Because of this perception, it was suggested that Olney J took a wrong approach to the questions before him. Instead of considering the current customs and practices of the applicants, Justice Olney sought to trace an unbroken chain of connection from pre-contact to the present. As I and others have argued elsewhere, this led his Honour to focus on the

discontinuities rather than the continuities of Yorta Yorta culture and society.

On appeal, all of the judges agreed that 'a frozen in time' approach was incorrect. This was clearly established by the High Court in *Mabo*. In the language of Deane and Gaudron JJ (at 110), 'the traditional law or customs is not… frozen at the moment of establishment of a Colony'. Brennan J (at 61), too, said that:

Of course in time the laws and customs of any people will change … But so long as the people remain as an identifiable community … living under its laws and customs, the communal native title survives to be enjoyed by the members of according to the … traditionally based laws and customs, as currently acknowledged and observed.

The majority of the Full Court in this appeal, Justices Branson and Katz, adopted this language of traditionally *based* laws and customs to explain their evolving nature (para 122). Their Honours suggested, however, that the laws and customs must remain 'traditional' in the sense that they maintain rather than break the connection with the past.

Their Honours finding (para 126-127) that, contrary to the argument from the appellants, the test of whether a law was traditional was an objective one, did not necessarily mean that adoption of the dominant colonial culture necessarily meant an abandonment of traditional connection. Moreover, it is not the laws and customs, or the particular native title interest, that burdened the Crown's radical title at the time of sovereignty, it was the fact of the existence of native title. The traditional laws and customs, or the title's nature and incidents may evolve and change over time.

However, the majority held that the finding that the community had lost its traditional connection to the land was open to the trial judge to make. They held that no sufficient argument had been made for the appeal court to disturb that finding or to inquire whether they should replace their opinion for that of the trial judge. The majority therefore dismissed the appeal.

The Chief Justice, however, found (paras 67-68) that although the trial judge had not adopted a strict frozen in time approach as envisaged in *Mabo*, Olney J had nevertheless made an error in his approach to what is considered 'traditional' and failed to give proper recognition to adaptation and change. The Chief Justice criticised (at para 50) the failure to

investigate issues of fact, especially the current customs and practices of the Yorta Yorta. Indeed, the Chief Justice posited this as the starting point of the inquiry. This had the advantage, his Honour argued, of seeing adaptations and evolution for what they are. His Honour was also cautious (at para 55) of the weight attributed to historical accounts, with their cultural preconceptions, and often written for their own purposes, over oral histories of the Indigenous applicants. The Chief Justice would have allowed the appeal and sent the case back to the trial judge for further consideration.

It is expected that the decision will be appealed to the High Court and Chief Justice Black's judgement gives some support to the Yorta Yorta nations' case. The High Court has recently heard appeals in the *Yarmirr* (Croker Island) and *Ward* (Miriuwung Gajerrong) cases. Although decisions have not yet been handed down (and indeed are not likely for some time), some of the judges in those hearings repeatedly warned against a 'frozen in time approach' as well as an undue emphasis on 'traditional lifestyle' as an indicator of 'traditional connection' in the native title context. The judges emphasised the Act as the starting point in investigating whether native title exists. They drew attention to the provisions of section 223, which refer to traditional law and custom in the present tense, not by reference to pre-contact society.

This emphasis is consistent with the observations made by Chief Justice Black in the Yorta Yorta appeal (paras 40, 49). Chief Justice Black summarised his view (at para 49) in saying that the laws and customs presently observed must reflect a continuity of tradition and be rooted in the past but may adapt and evolve. Moreover, native title may exist despite profound impacts upon the Indigenous community, including dispossession and the cessation of a 'traditional' lifestyle.

The different judgements at trial and on appeal highlight the significance of the understanding of 'tradition' that is to be adopted by the courts, and the nature of the inquiry into continuity of law and custom, to the outcome in a particular case. Given the arguments and the comments from the High Court, the forthcoming decisions in *Yarmirr* and *Ward* may provide further guidance before the Yorta Yorta bring their case in due course.

Lisa Strelein
Native Title Research Unit